(1)

Supreme Court, U.S.
FILED

0210 24 DEC 31 2002

OFFICE OF THE CLERK

No.

In the Supreme Court of The United States

DEMETRIUS CUNNINGHAM,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Illinois Appellate Court, First District

PETITION FOR WRIT OF CERTIORARI

Ronald F. Neville
Counsel of Record
Neville & Mahoney
221 North La Salle Street
Suite 2100
Chicago, Illinois 60601
(312) 236 - 2100

78 pp

QUESTION PRESENTED

Whether the petitioner, a fifteen-year-old boy who was brought to the police station by his father as a witness and thereafter separated from his father to observe a lineup, was denied due process of law under the Fifth and Fourteenth Amendments to the United States Constitution when, after the petitioner failed to identify anyone in the lineup, he was immediately arrested by Chicago police detectives and interrogated by them in a detention room where he confessed to a murder, without the knowledge or presence of his father who was still present in the police station and waiting for the petitioner, and without the presence of a juvenile officer who was present in the police station.

TABLE OF CONTENTS

QUESTION PRESENTED..... i

TABLES OF AUTHORITIES..... iii

OPINIONS BELOW..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 1

STATEMENT OF THE CASE..... 4

REASONS FOR GRANTING THE WRIT..... 6

CONCLUSION..... 16

APPENDICES..... A-1

APPENDIX A -- OPINION OF THE ILLINOIS APPELLATE COURT , FIRST DISTRICT..... A-1

APPENDIX B --TRIAL COURT'S RULING DENYING THE MOTION TO SUPPRESS..... B-1

APPENDIX C - LETTER FROM CLERK OF THE SUPREME COURT OF ILLINOIS..... C-1

TABLE OF AUTHORITIES

Arizona v. Fulminante, 499 U.S. 279, 286, 111 S.Ct. 1246, 1252, 113 L.Ed.2d 302 (1991) 8, 9

Ashcraft v. Tennessee, 322 U.S. 143, 147-48, 64 S.Ct. 921, 923, 88 L.Ed. 1192 (1944)..... 8, 9

Clewis v. Texas, 386 U.S. 707, 725, 87 S.Ct. 1338, 1339, 18 L.Ed.2d 423 (1967)..... 8, 9

Fare v. Michael C., 442 U.S.707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)..... 8

Gallegos v. Colorado, 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962)..... 10, 12, 14

Haley v. Ohio, 332 U.S. 596, 599, 68 S.Ct. 302, 303, 92 L.Ed. 224 (1948)..... 8, 9, 10

Hardaway v. Young (7th Cir.2002) 302 F.3d 757, 764..... 16

In Re Gault, 387 U.S. 1, 55, 87 S.Ct. 1428, 1458, 18 L.Ed.2d 527 (1967)..... 9,10

In re G.O. 191 Ill.2d 37, 245 Ill.Dec. 269..... 8, 14

Little v. Arkansas, 435 U.S. 957, 98 S. Ct. 1590, 55 L.Ed. 2d 809..... 16

Payne v. Arkansas, 356 U.S. 560, 568, 78 S.Ct.844, 850, 2 L.Ed.2d 975..... 13, 14

People v. Brown, 182 Ill.App.3d 1046, 131 Ill.Dec. 534 (1st Dist. 1989)..... 15

People v. Morgan 197 Ill.2d 904, 259 Ill.Dec. 405..... 14

People v. Plummer, 306 Ill.App.3d 574, 239 Ill.Dec. 505, 515 (1st Dist. 1999)..... 15

Riley v. Illinois, 435 U. S. 1000, 98 S. Ct 1657, 56 L.Ed. 2d 91 (1978)..... 16

Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).....8

Statutory Provisions:

Conn. Gen. Stat. Ann. Sec. 46b-137(a) (West 1986)..... 2, 16

Tex. Fam. Code Ann., Sec. 51.09(a) (West 1986)..... 3,16

Illinois Juvenile Act, 705 ILCS 405/5-6(2) (West 1996)..... 3, 11

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Illinois appellate court, First District (App., *infra*, A-1) is reported at 332 Ill.App.3d 233, 265 Ill.Dec. 918, 773 N.E.2d 682. The Illinois supreme court's denial of the petitioner's Petition For Leave To Appeal to the Illinois supreme court (App., *infra*, C-1) is unreported. The written opinion of the circuit court of Cook County, county department, criminal division ("trial court") denying the petitioner's motion to suppress statements is included in the appendix at App., *infra*, B-1. The judgment of the trial court is unreported.

JURISDICTION

The decision of the Illinois appellate court (App., *infra*, A-1) was issued on June 28, 2002. On October 2, 2002, the Illinois supreme court denied the petitioner's Petition For Leave To Appeal the decision of the Illinois appellate court (App., *infra*, C-1). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 5 to the Constitution of the United States states:

> [N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14, Section 1, to the Constitution of the United States states:

> [A]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Conn. Gen. Stat. Ann., Sec. 46b-137(a) (West 1986) states:

> [A]ny admission, confession or statement, written or oral, made by a child to a police officer or Juvenile Court official shall be inadmissible in any proceeding concerning the alleged delinquency of the child making such admission, confession or statement unless made by such child in the presence of his parent or parents or guardian and after the parent o parents or guardian and child have been advised (1) of the child's right to retain counsel, or if unable to afford counsel, to have counsel appointed on the

child's behalf, (2) of the child's right to refuse to make any statements and (3) that any statements he makes may be introduced into evidence against him.

Illinois Juvenile Act, 705 ILCS 405/5-6(2)) (West 1996), Section 5-6(2) provides:

> A law enforcement officer who takes a minor into custody without a warrant under section 5-5 shall, if the minor is not released, immediately make a reasonable attempt to notify the parent or other person legally responsible for the minor's care or the person with whom the minor resides, that the minor has been taken into custody and where the minor is being held, and the law enforcement officer shall without unnecessary delay take the minor to the nearest juvenile police officer designated for such purposes in the county of venue.

Tex. Fam. Code Ann., Sec. 51.09(a) (West 1986) states:

> Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if:
>
> (1) the waiver is made by the child and the attorney for the child;
>
> (2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it;
>
> (3) the waiver is voluntary; and
>
> (4) the waiver is made in writing or in court proceedings that are recorded.

STATEMENT OF THE CASE

On November 23, 1994, Elsie Orlinsky was situated in the driver's seat of her automobile parked in a parking lot when the offender opened the driver's door, pushed Orlinsky over to the passenger side of the vehicle, and drove away. She was later found at the beach where she had been murdered. The police subsequently learned the petitioner had been in possession of the decedent's vehicle after November 23, 1994, which petitioner said was given to him by a black man he could identify.

According to Chicago police detective Michael Baker ("Baker"), the police believed defendant was a witness to the abduction and murder of Elsie Orlinsky. On December 14, 1994 at approximately 6:00 p.m., at Baker's request, petitioner went with his father, Douglas Cunningham, to Chicago Police Department Area 2 headquarters to view a lineup to determine if the man who gave the petitioner the decedent's car was present. Both petitioner and his father testified that when Baker took petitioner to see the lineup, petitioner's father advised Baker he did not want Baker discussing anything with petitioner besides the lineup unless petitioner's father and an attorney were present. (S.R. Vol. III, 94, 120)

At the lineup, petitioner failed to identify anyone. Present in the lineup was an individual who had previously been identified by two eyewitnesses as the person who abducted Orlinsky in her car. Following the lineup, Petitioner was not taken back to his father who was still present at Area 2 headquarters and waiting for his son, but instead forced into an interview room he was not free to leave, where he was questioned by two experienced detectives, Baker and George Karl ("Karl"), resulting in petitioner's confession to Orlinsky's murder. (S.R. Vol. III, 36-37)

Both petitioner and his father testified the father advised Baker he wanted to be present if his son was interviewed. Baker said he could not recall the father advising him that he wanted to be present if his son was interviewed, but admitted it was possible the request was made. (S.R. Vol. III,

35-36) Cook Count assistant state's attorney Faraci ("ASA Faraci") admitted at trial that on December 12, 1994, the petitioner's father made it known he wanted to be present for any interrogation of his son.

When petitioner was forced into the interview room, he was 15 years old and his only prior experience with law enforcement was a curfew violation. (S.R. Vol. III, 86-87) Baker was aware petitioner's father was only 50 feet away from the room in which petitioner was being interviewed. (S.R. Vol. III, 34-35) It is undisputed that neither Baker, Karl, nor anyone else advised petitioner's father the petitioner was being interviewed as to his possible involvement in the Orlinsky homicide, and petitioner's father was never allowed the opportunity to confer with his son prior to or during that interview. It is also uncontested that neither Baker nor Karl ever advised petitioner he could speak with his father prior to or during the interview. (S.R. Vol. III, 39-40, 43-44) Baker admitted that while in the interview room, no mention was made of petitioner's father until after petitioner had confessed. (S.R. Vol. III, 60) Petitioner testified he was told his father had left, testimony which was not rebutted by any State witness. (S.R. Vol. III, 95-96, 103)

Despite the presence of youth officers in Area 2 headquarters (R. E94), no youth officer spoke with petitioner prior to the interrogation or was present for the interrogation. No attempt was made by anyone to notify a youth officer of the circumstances. (S.R. Vol. III, 43, 42) While evidence conflicted on whether or not petitioner was advised of his Miranda warnings, no one disputed the fact petitioner was not presented with a written form containing the Miranda warnings. (S.R. Vol. III, 55) Additionally, petitioner testified he was verbally abused by Baker and Karl and slapped several times. (S.R. Vol. III, 97-98) While Baker denied petitioner's accusations, petitioner's father and attorney Lonnie Randolph ("Randolph") both testified petitioner appeared to have been crying and his face was red and puffy. Petitioner also told Randolph he had been struck by the officers when Randolph was finally allowed to meet with the petitioner in the early morning hours of the day following his arrest. (S.R. Vol. III,123, Vol. IV, 8-9) Karl

testified at trial that when petitioner was in the interview room he appeared very upset and distraught. (R. K58)

The evidence in this case demonstrated a concerted effort by the police to keep petitioner's parents from their son. Doug Cunningham testified that after petitioner was taken to view the lineup and was not returned for a substantial period of time, he attempted to learn the location of his son but was rebuffed by the police. (S.R. Vol. III, 120-122) Doug Cunningham was allowed to see his son sometime after petitioner allegedly confessed, but only for the purpose of hearing petitioner's confession. Further, the evidence is uncontested that even after petitioner gave a statement to the police, he was not allowed to see his parents or his uncle despite their persistent efforts to see him.

The violation of the petitioner's due process rights was raised in a motion to suppress statements upon which a hearing was conducted before the trial court. On April 29, 1998, the trial court denied the petitioner's motion to suppress and filed a written opinion (App. *infra*, p. B-1)

Thereafter, on June 19, 1999, following a jury trial, the petitioner was convicted of first degree murder, aggravated kidnaping, aggravated vehicular hijacking and robbery. Subsequently, the petitioner was sentenced to 80 years for first degree murder, 30 years for aggravated vehicular hijacking, 15 years for aggravated kidnaping, and 7 years for robbery. The trial court's denial of the petitioner's motion to suppress statements was raised before the Illinois appellate court, and, on June 28, 2002, that court issued its opinion affirming the defendant's convictions (App., *infra* p. A-1) On October 2, 2002, the Illinois supreme court denied the petitioner's Petition For Leave To Appeal (App., *infra*, p. C-1).

REASONS FOR GRANTING THE WRIT

By far, the most damaging evidence against the petitioner was his confession. The finding by the trial court and the Illinois appellate court that petitioner's confession was voluntary is squarely in conflict with decisions of this Court. The Illinois appellate court has created a rule of law

now applicable in the State of Illinois that, so long as a juvenile is advised of his Miranda warnings and not subjected to physical or mental coercion (over and above the mental coercion attendant to being refused access to a parent or other interested adult), the police may deliberately deny the juvenile access to his parents or other interested adult, even if one or both parents and/or interested adult are readily available and actively seeking to be with the child. In essence, the Illinois appellate court has held, contrary to this Court's prior decisions, that a fifteen year old suspect is entitled to no more protection than that afforded an adult.

This confession was elicited from the petitioner, a fifteen-year-old boy, after the police separated him from his father who was present in the police station waiting for his son to return to him. The petitioner and his father voluntarily came to the police station at Baker's request to view a lineup. After the petitioner failed to identify an individual in the lineup who had been identified by others as the person who abducted Orlinsky, the police immediately arrested the petitioner, forced him into a detention room, refused to allow him to speak with his father, and interrogated the petitioner. The police also deliberately failed to inform the petitioner's father they had arrested his son and were questioning him concerning his involvement in Orlinsky's murder despite the fact the father was only 50 feet away from his son, and resisted all efforts by the petitioner's father to speak with his son. Despite the fact a youth officer was present and available in the same building in which the petitioner was questioned, the Chicago police detectives never notified a youth officer of the petitioner's interrogation and no youth officer was present when the petitioner was interrogated. Moreover, after the petitioner allegedly confessed, the police continued to resist the efforts of the petitioner's parents and an uncle from meeting with and speaking to the petitioner.

The trial court denied petitioner's motion to suppress his confession, ruling petitioner's waiver of his Fifth Amendment rights and subsequent confession were voluntary, notwithstanding the presence of petitioner's father at the police station and the failure of the police to

allow petitioner to confer with his father or a youth officer. In blindly accepting the trial court's findings on this issue and other important issues, the Illinois appellate court did not conduct the *de novo* review of the record mandated by this Court in Clewis v. Texas, 386 U.S. 707, 708, 87 S.Ct. 1338, 1339, 18 L.Ed.2d 423 (1967); Haley v. Ohio, 332 U.S. 596, 599, 68 S.Ct. 302, 303, 92 L.Ed. 224 (1948); Ashcraft v. Tennessee, 322 U.S. 143, 147-48, 64 S.Ct. 921, 923, 88 L.Ed.1192 (1944); and Arizona v. Fulminante, 499 U.S. 279, 286, 111 S.Ct. 1246, 1252, 113 L.Ed.2d 302 (1991), and the Illinois supreme court in In re G.O., 191 Ill.2d. 37, 245 Ill.Dec. 269, 276 (2000).

Given the totality of the circumstances presented by the record in the case at bar, a finding of voluntariness is contrary to the decisions of this Court.

The voluntariness of a confession is judged on the basis of the totality of the circumstances surrounding the confession. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); Fare v. Michael C., 442 U.S.707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). In juvenile cases, that totality approach requires an "evaluation of the juvenile's age, experience, education, background, and intelligence" as well as the circumstances regarding the confession. Fare, 442 U.S. at 725.

The Illinois appellate court also accepted the trial court's finding that the police did not prevent the father from speaking with his son. However, it was uncontested that after the lineup, Baker immediately brought petitioner to an interview room without advising petitioner's father that petitioner was going to be interviewed as to his possible involvement in the homicide. The only person who knew petitioner was being interrogated were Baker and Karl, neither of whom left the interview room until after petitioner had confessed. (S.R. Vol. II, 46-53) Though the trial court found that the police did not prevent the father from speaking with his son, the trial court reached this illogical conclusion in the face of uncontradicted evidence the father was not informed either as to his son's whereabouts or as to the fact his son was being interrogated.

Moreover, the father presented uncontradicted

testimony that during the time petitioner was being interviewed by the police, the father attempted to locate and speak with his son but his attempts were thwarted by the police. The record demonstrates that, notwithstanding the presence of petitioner's father at the police station and his expressed desire to be present for any questioning of his son, petitioner was deliberately secreted from his father while he was interrogated about the murder. The findings of the trial court and Illinois appellate court are against the manifest weight of the evidence on this issue.

A ruling by the trial court and finding by the jury regarding the voluntary character of the confession does not foreclose the duty of this Court to undertake an independent examination of that issue. Clewis, 386 U.S. at 708, 87 S.Ct. at 1339; Haley, 332 U.S. at 599, 68 S.Ct. at 303; Ashcraft, 322 U.S. at 147-48, 64 S.Ct. at 923; and Fulminante, 499 U.S. at 286, 111 S.Ct. at 1252. The assertion petitioner was orally advised of his Miranda rights is not conclusive since this Court has said it will not assume that a boy of fifteen, without aid of counsel, has a full appreciation of such advice and will not:

> ...give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and made an empty form of the due process of law for which free men fought and died to obtain. Haley, 332 U.S. at 601, 68 S.Ct. at 304

This Court has recognized that the "greatest care" must be taken to assure a juvenile's statement has not been coerced or suggested and that "it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." In Re Gault, 387 U.S. 1, 55, 87 S.Ct. 1428 (1967). Accordingly, because a juvenile is "an easy victim of the law," *** "special care in scrutinizing the record must be used" Haley, 332 U.S. at 599, 68 S.Ct. at 303, and his confession will be deemed inadmissible if an examination of the facts reveals that it was "...a confession wrung from a

child by means which the law should not sanction." Haley, 332 U.S. at 601, 68 S.Ct. at 304.

In the case at bar, petitioner's confession was procured in a manner which the law should not sanction. The Illinois appellate court recognized that the presence of a concerned adult is a significant factor in determining the voluntariness of a juvenile's confession, but, nevertheless, because of the absence of a *per se* rule that a juvenile be allowed to confer with an interested adult prior to or during questioning, attached minimal weight to the failure of the police to allow petitioner to speak with his father prior to questioning. In fact, recognizing that in the case at bar the police deliberately secreted petitioner from his father for the purpose of denying petitioner his father's advice and counsel, the Illinois appellate court held and created a rule of law now applicable in the State of Illinois that, so long as a juvenile is advised of his Miranda warnings and not subjected to physical or mental coercion (over and above the mental coercion attendant to being refused access to a parent or other interested adult), the police may deliberately deny the juvenile access to his parents and/or an interested adult, even if such individuals are readily available and actively seeking to be the child. In essence, the Illinois appellate court has held, contrary to this Court's rulings in Haley, Gault, and Gallegos v. Colorado, 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962), that a fifteen year old suspect is entitled to no more protection than that afforded an adult. This Court should grant the writ of certiorari to correct the Illinois appellate court's ruling in order to avoid the profound due process violations which will be suffered by juveniles in the State of Illinois and elsewhere as a result of the Illinois appellate court's decision.

The conduct of the police in this case reflects a deliberate and concerted effort to deny defendant access to any adult interested in his well being. The police knew petitioner's father, who was present in the police station, clearly stated that he wished to be in the immediate presence of his son during any interrogation of his son. Baker confessed he made no attempt to inform the father that the detectives wished to interrogate the petitioner, and further, failed to

advise petitioner that he had a right to confer with his parents. While Baker professed an inability to recall Doug's specific request to be present for any interrogation, he conceded such a request may have occurred. Also, ASA Faraci admitted that on December 12, 1994, petitioner's father made it known he wanted to be present for any interrogation of his son. It defies logic to suggest that two days later, petitioner's parents would have no interest in being present for the interrogation of their son in the connection with a murder investigation.

Given the presence of petitioner's father at the police station and his expressed desire to be present for any questioning of his son, the State cannot in good faith deny petitioner was deliberately secreted from his father while he was interrogated about the murder in violation of Illinois law. Section 5-6(2) of the Juvenile Court Act (705 ILCS 405/5-6(2) (West 1996)) provides:

> A law enforcement officer who takes a minor into custody without a warrant under section 5-5 shall, if the minor is not released, immediately make a reasonable attempt to notify the parent or other person legally responsible for the minor's care or the person with whom the minor resides, that the minor has been taken into custody and where the minor is being held, and the law enforcement officer shall without unnecessary delay take the minor to the nearest juvenile police officer designated for such purposes in the county of venue.

Baker confessed he made no attempt to inform Doug that the detectives wished to interrogate defendant, nor did he advise defendant that defendant had the right to confer with his father. Petitioner was not free to leave the interview room, and Baker deliberately refused to bring defendant's father to petitioner.

Despite the presence of youth officers in the same building the petitioner occupied, no effort was made to secure a youth officer to speak to and advise the petitioner prior to his interrogation. However, as soon as petitioner confessed, the police promptly notified a youth officer to sit

at petitioner's side. No explanation for Baker's failure to contact a youth officer was offered at the motion to suppress. At trial, Baker attempted to explain his failure to contact a youth officer by stating petitioner's status was that of a witness and a youth officer was not necessary. (R. E94-95) Baker's explanation is belied by his admission at the motion to quash arrest that after the petitioner failed to identify the individual in the lineup identified by others as the one who kidnaped Orlinsky, he was no longer a witness. Baker's explanation is further rebutted by the fact that immediately upon entering the interview room, petitioner was confronted with statements he allegedly made to others and advised of his rights.

The totality of the circumstances in this case, including the youth of the petitioner, his inexperience with police procedures, the manner of interrogation, the lack of a written waiver of rights, and especially, the deliberate frustration of petitioner's father's ability to confer with his son, patently establish petitioner's confession was involuntary.

In the case at bar, the Illinois appellate court deemed inconsequential the fact the petitioner was denied access to his parents, a youth officer, or a lawyer prior to his confession and not allowed meaningful contact with his parents or an attorney until the next day because petitioner's confession was elicited within thirty minutes after the secretive questioning began. However, this Court rejected this position in Gallegos v. Colorado, 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962) and ruled:

> The fact that petitioner was only 14 years old puts this case on the same footing as Haley v. Ohio, supra. There was here no evidence of prolonged questioning. But the five-day detention - during which time the boy's mother unsuccessfully tried to see him and he was cut off from contact with any lawyer or adult advisor - gives the case an ominous cast. The prosecution says that the boy was advised of his right to counsel, but that he did not ask either for a lawyer or for his parents. But a 14-year-old boy, no matter how sophisticated, is unlikely to have any

conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protest his own interests or how to get the benefits of his constitutional rights.

The prosecution says that the youth and immaturity of the petitioner and the five-day detention are irrelevant, because the basic ingredients of the confession came tumbling out as soon as he was arrested. But if we took that position, it would, will all deference, be in callous disregard of this boy's constitutional rights. He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights -- from someone concerned with securing those rights - and with the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against his inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow his conviction to stand would, in effect, be to treat him as if he had no constitutional rights.

There is no guide to the decision of cases such as this, except by the totality of circumstances that bear on the two factors we have mentioned. The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend -- all these combine to make us conclude that the formal confession on which this conviction may have rested (see Payne v.

Arkansas, 356 U.S. 560, 568, 78 S.Ct.844, 850, 2 L.Ed.2d 975) was obtained in violation of due process. 370 U.S. at 53-55, 82 S.Ct. at 1212-13.

No substantial difference exists between the facts of the case at bar and those before this Court in Gallegos, which necessitates the conclusion the petitioner's confession was obtained by the Chicago police in violation of the petitioner's due process rights and should compel this Court to grant the writ of certiorari.

In support of its decision, the Illinois appellate court cites the Illinois supreme court's decisions in In re G.O., 191 Ill.2d 37, 245 Ill.Dec. 269 and People v. Morgan, 197 Ill.2d 404, 259 Ill.Dec. 405, as authority for the proposition that a juvenile's statement need not be suppressed simply because he was denied the opportunity to speak with a parent or concerned adult. However, unlike the instant case, neither in G.O. nor Morgan did the police frustrate a parent's attempts to confer with their child. In Morgan, the defendant approached an officer at the scene of the crime and stated he wished to tell what happened. While the defendant's parents were not contacted, the police did nothing to frustrate any attempt by the parent to confer with their child. Similarly, in G.O., a youth officer was present for the questioning of the defendant and the Illinois supreme Court expressly found that the police did not frustrate any attempts by the defendant's mother to confer with her son. In the instant case, such a finding cannot be made in light of the uncontradicted evidence. The Illinois appellate court fails to cite a single case where a juvenile's confession was found to be voluntary, notwithstanding the fact that the confession was elicited while the juvenile's parent was at the police station, and the juvenile was not afforded the right to consult with him or her.

The Illinois appellate court also attributed minimal weight to the failure of the police to contact a youth officer to confer with petitioner, finding that because petitioner had an opportunity to confer with his father prior to the interrogation, the absence of a youth officer did not contribute to a coercive atmosphere. That petitioner spoke

with his father prior to being interrogated is of absolutely no consequence. At that time neither petitioner nor his father were aware that petitioner may be the target of the investigation. Therefore, there was no reason for petitioner and his father to confer on such issues as petitioner's right to remain silent and right to counsel. Any subsequent waiver by petitioner of his constitutional rights cannot be said to have been knowingly made with the consent of an adult interested in the child's well being.

The Illinois appellate court's opinion that the absence of a youth officer was of minimal significance also ignores the function a youth officer is supposed to serve.

> Consistent with the holding in [People v.] Brown, youth officers should be required to verify whether a juvenile's parent or other significant adult has been notified of the presence of the juvenile and to determine if the parent wishes to confer with the juvenile prior to questioning. If the parent indicates he or she wishes to confer with the juvenile, the youth officer should see that questioning ceases until they can confer. People v. Plummer, 306 Ill.App.3d 574, 239 Ill.Dec. 505, 515 (1st Dist. 1999)

In a well-reasoned dissent to the opinion in G.O., Justice McMorrow advocated the creation of a *per se* rule whereby no confession given by a juvenile under the age of 15 would be admitted unless the youth was permitted, before or during questioning, to consult with a lawyer or other interested adult. In support of her position, Justice McMorrow observed:

> [T]o presume that all adolescents are capable of understanding the right against self-incrimination and are able to make an informed waiver of that right ignores the basic maturation process common to all persons. We assume that adolescents lack the judgment and experience to own a credit card (815 ILCS 140/7.2 (West 1998)), get a tattoo (720 ILCS 5/12-10(West 1998)), consume alcohol (235 ILCS 5/6-16 (West 1998)), or drive an automobile (625 ILCS

5/6-103 (West 1998)). Yet the majority insists that youth of the same age can synthesize subtle constitutional concepts, and comprehend the life-altering consequences that will follow a waiver of those rights. Our adherence to this artificial distinction is nonsensical and should be abandoned. 191 Ill.2d 37, ___, 245 Ill.Dec. at 288

In Hardaway v. Young (7th Cir.2002) 302 F.3d 757, 764, the Seventh Circuit observed:

> [I]t is thus somewhat incongruous that the state of Illinois believes that children, in whose decisions the state has so little confidence in other areas (children under the age of 16 may not marry, make a will, smoke, operate a motor vehicle, consent to medical care, or pierce their bodies) should be subjected to questioning for major crimes they are suspected of having committed without the continuous presence and assistance of a friendly adult.

See also: Marshall, J. dissenting from denial of certiorari in both Riley v. Illinois, 435 U.S. 1000 (1978) and Little v. Arkansas, 435 U.S. 957 (1978) (unreasonable that a juvenile who is prevented by law from participating in may everyday activities, could be found competent to waive her right against self-incrimination.)

Recognizing the gravity of interrogating juveniles in the absence of interested adults, other states have adopted a *per se* rule precluding the police from engaging in the secretive questioning which occurred in the case at bar. For example, in Connecticut, a child's confession is inadmissible unless it was made in the presence of a parent or guardian after both the child and parent have been advised of the child's Miranda rights. Conn. Gen. Stat. Ann. Sec. 46b-137(a) (West 1986). In Texas, a juvenile may only waive the right to counsel if the waiver is made by the child and the child's lawyer. Tex. Fam. Code Ann. Sec. 51.09(a) (West 1986).

Petitioner urges this Court to grant the petitioner's writ of certiorari and issue an opinion clarifying for all courts that due process requires juveniles must be afforded the

opportunity to confer with a parent or other interested adult prior to, or during, police questioning. The rule of law created by the opinion of the Illinois appellate court in the instant case will have the opposite effect. Under its decision, not only will the police be under no duty to provide a juvenile with the opportunity to speak with a parent or other interested adult, the police may actually refuse to permit a parent who is present at the police station and requesting to see his or her child, from conferring with that child. Such a rule can only frustrate the goal of the judiciary to ensure that any waiver by a juvenile of his constitutional rights is made knowingly and voluntarily. The danger of such a rule of law is especially evident in cases such as the instant one, where no eyewitness has identified the juvenile as the offender and no physical evidence links him or her to the offense.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted

Respectfully submitted,

Ronald F. Neville
Counsel of Record
Neville & Mahoney
221 N. LaSalle Street
Chicago, Illinois 60601
312-236-2100

Counsel for Petitioner

December 31, 2002

APPENDICES

APPENDIX A

OPINION OF THE ILLINOIS
APPELLATE COURT , FIRST DISTRICT

FIFTH
DIVISION
June 28, 2002

No. 1-99-4294

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DEMETRIUS CUNNINGHAM, Defendant-Appellant.	Appeal from the Circuit Court of Cook County Honorable Lon Schultz, Judge Presiding.

JUSTICE QUINN delivered the opinion of the court:

Following a jury trial, defendant, Demetrius Cunningham, was convicted of first degree murder, aggravated kidnaping, robbery and aggravated vehicular hijacking. Defendant was 15 years old at the time the incident occurred. Defendant was sentenced to 80 years for first degree murder, 30 years for

aggravated vehicular hijacking, 15 years for aggravated kidnaping and 7 years for robbery. The sentences were ordered to run concurrently. Defendant now timely appeals.

On appeal defendant argues that his convictions should be reversed where: (1) he was arrested without probable cause; (2) his confession should have been suppressed; and (3) he was not proven guilty beyond a reasonable doubt; and the trial court erred: (4) in permitting a witness to identify him in court; (5) in denying his objection to hearsay; (6) in denying his motion to bar the State's footprint expert's testimony; (7) in permitting the State's footprint expert to testify regarding his statistical theory; and (8) in failing to order a mistrial when a detective deliberately violated a court order. Finally, defendant claims that the prosecutor's comments during closing arguments and rebuttal deprived him of a fair trial. Also, in a supplemental brief, defendant argues that his extended-term sentence violates Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

We will discuss the issues relating to defendant's confession and the testimony of the State's footprint expert in this opinion. All other issues will be discussed in a Rule 23 (166 Ill. 2d R. 23) order issued contemporaneously with this opinion. For the reasons that follow, we affirm defendant's convictions and sentence.

I. STATEMENT OF FACTS

On November 23, 1994, Elsie Orlinsky, the 80-year-old victim, was abducted in her 1992 Oldsmobile Delta from the Walgreen's parking lot on 55th Street and Lake Park Avenue in Chicago. Later that afternoon, her body was found at the 63rd Street beach. The victim's car was not found at the scene.

A. State's Case In Chief

Chicago police evidence technician Thomas

Reynolds testified that on November 23, 1994, he processed the crime scene. Reynolds testified that the victim's head was bloody. Near the body, Reynolds observed a walking cane broken into three pieces, some blood on the bottom of a 55-gallon drum that was near the victim's head and impressions of shoeprints near the body. No fingerprints could be lifted from the drum because the surface was unsuitable. Reynolds photographed the scene, the victim and the footprint impressions.

Richard Rubin testified that on November 23, 1994, he was a detective with the Chicago police department who drew composite sketches. Rubin met with a witness, Jose Lopez, who provided him with information from which he generated a composite of the alleged offender in this case.

Jose Lopez testified that on November 23 he was making a delivery in the Hyde Park area. Lopez said that while stopped at a stop sign at 53rd and Kimbark Street, he saw a late model Oldsmobile pull into the intersection. The car, which was 15 feet away, stopped in front of Lopez for approximately 10 seconds. Lopez testified that later that evening, after seeing a story about the murder on the news, he contacted the police and described the driver of the car. Lopez viewed a lineup at Area 2 but told detectives he was unable to identify the man he saw in the car that day. When asked which of the men most resembled the man he saw, Lopez identified a man in the lineup named James Pugh. On approximately December 15, 1994, Lopez was shown a photograph array which included a photograph of the defendant. Lopez said he was unable to identify the driver of the car from the photographs. A few days later Lopez was shown another photograph array which included a picture of the defendant. Lopez said that if you put glasses and a mustache on the defendant, "he looks just like him (the offender), he's got that same goofy look."

Donald Sebastian testified that he is the assistant principal of the Mt. Carmel High School. Sebastian

testified that the beach area of 64th Street and the lakefront was approximately one mile east of the school. Sebastian testified that on November 23, 1994, the school day was shortened from 8:30 a.m. to 12:05 p.m. as it was the day before Thanksgiving. Mt. Carmel's attendance records indicated that defendant was present in school that day.

Gregory Talbert testified that on November 23, 1994, he was walking across the intersection of 55th Street and Lake Park Street. He saw a green Oldsmobile speeding south on Lake Park, come skidding to a stop, and almost hit him. Talbert said he looked inside the car and saw a white, older lady pressed up against the glass of the window. He saw the man on the driver side grab the lady, put her in a head lock and punch her until she was unconscious. Approximately five to seven seconds elapsed until the car pulled away. Talbert viewed a lineup in early December of 1994 and positively identified James Pugh as the driver of the car. In October of 1998, Talbert was shown a photograph of the original lineup and again identified Pugh. At trial, Talbert testified that he was now only 40% sure that the man he identified in the lineup was the driver of the car.

Douglas Heilman testified that he was a special agent with the Federal Bureau of Investigation (FBI) in Chicago on November 23, 1994, assigned to a carjacking homicide. On December 12, 1994, he processed the victim's Oldsmobile for evidence. Thirty-three fingerprints were lifted from the car. Ten fingerprints and one palmprint matched the prints of Lamont Borom. None of the fingerprints recovered matched those of James Pugh or defendant. In addition, a black and yellow screwdriver was recovered from the car. Heilman testified that on December 14 he executed a search warrant at defendant's home and recovered five pairs of tennis shoes and a nylon jacket.

Theodius Jackson testified that on November 25, 1994, he was standing on a street in East Chicago, Indiana, when defendant and his brother, Jason

Cunningham, pulled up in a new-looking car. When he asked where they got the car, defendant responded that he bought it from his uncle in Chicago for $500. Jackson saw Indiana plates on the car on that date. A few days later, Jackson again saw defendant. Defendant said he was meeting Lamont Borom because Lamont was using the car. Jackson testified that he again asked defendant where he got the car and defendant said he hit an old white lady and took her car. Jackson further testified that on the evening of December 1, 1994, he was riding around in the Oldsmobile with defendant and Lamont. Jackson said that defendant again told him that he hit an old white lady and took her car "by the Loop." When questioned where "the Loop" was, defendant said it was on the other side of Mt. Carmel. Defendant told Jackson he took the lady's purse, $10 and her keys. While riding in the car that night, defendant took a screwdriver out of the armrest and began scraping a handicap sticker off the window. Jackson stated that defendant had a light mustache in November of 1994 and looked basically the same now as he did when the incident occurred.

Lamont Borom testified that around Thanksgiving of 1994 he saw defendant and his brother in a green Oldsmobile. Borom said that the defendant told him he got the car from a dope-dealing uncle in Alabama for $500. Borom testified that a week later he drove the car with Jackson and defendant riding as passengers. When Jackson questioned defendant as to where he got the car, defendant said he hit an old white lady "in the Loop" and dragged her out of the car. Defendant said he took her purse, $10 and keys to her car. Borom was driving the car on December 12, 1994, with Jackson when they were pulled over by a police car and arrested. Borom testified that defendant allowed him to keep possession of the car as long as he picked defendant up from school.

Dr. Edmund Donoghue testified that he is the chief medical examiner for Cook County. Donoghue conducted the postmortem examination of the victim,

Elsie Orlinsky. The examination revealed multiple injuries to the head and face including a skull fracture and subgaleal hemorrhage. In addition, the victim's body had injuries consistent with being defensive injuries. Donoghue concluded that the injuries observed on the victim were consistent with the victim having been struck by a cane and a 55-gallon drum and that she died as a result of blunt trauma.

Assistant State's Attorney (ASA) Peter Faraci testified that on December 12, 1994, he interviewed defendant in the presence of his father. ASA Faraci said that defendant told him that in November of that year he had left school and was walking to the train station when a man pulled up in a vehicle at 63rd Street and Dorchester Avenue and asked him if he wanted the car. Defendant said that he looked in the car to see if there was any blood, and once he determined that there was nothing wrong with the car he said he would take it. Defendant told ASA Faraci that he took the car, replaced the license plates and drove back to Indiana. Defendant said that he could identify the man who gave him the car. ASA Faraci asked defendant's father to bring him back to the station on December 14.

Chicago police detective Michael Baker testified that on December 12, 1994, he received a call from the East Chicago police department that a car taken in a Chicago homicide had been recovered. Baker proceeded to the station in Indiana and interviewed defendant. Defendant's parents were present at the station. Baker said that defendant told him that he was walking in the vicinity of 61st Street and Dorchester Avenue at around 4 p.m. on November 23 when a man pulled up in a car. Defendant said the man offered the car and he took it, driving it to Indiana, where he changed the license plates. Defendant said that he was watching the news on Thanksgiving Day when he saw a news story about a carjacking and murder. A composite sketch of the alleged offender was part of the story. Baker showed defendant the composite sketch of the offender and defendant said it had a strong

resemblance to the man who gave him the car. Baker testified that at that time he took defendant to the area of 61st Street and Dorchester so that he could identify where he got the car.

Baker then took defendant back to Area 2, where ASA Faraci spoke with defendant briefly. Baker then requested that, due to the late hour, defendant's parents bring him back to the station on December 14 because they had a suspect, James Pugh, in custody and they wanted defendant to identify him.

Baker testified that on December 14 the defendant and his father returned to Area 2. Defendant viewed a lineup containing James Pugh but was unable to identify anyone as the man who gave him the car. Baker said that defendant was then brought into an interview room alone. During the motion to suppress, Baker testified that defendant's father did not request to have an attorney present, nor did defendant request an attorney. Although defendant's father was present at the station, he was not present in the interview room. Baker confronted defendant with the statements obtained from Borom and Jackson. Defendant said that he wanted to tell the truth. At that point, Baker said he advised defendant of his Miranda rights. Baker testified that defendant's statement remained consistent with his previous statement but that defendant said he bought the car from the man for $250. Baker testified that he told defendant that he did not believe him. Defendant then told him that after school he was in the vicinity of 54th Street and Lake Park Street when he saw an older white woman get forced into a car by a black male. He observed a struggle and then the car pulled out of the lot. Defendant said he ran after the car and followed it to the beach house at 64th Street Beach. He said he saw the black male drag the lady out of the car and beat her with a cane. The man then took her purse and fled. Defendant said he then jumped in the car and took off.

Baker testified that he told defendant the story was nonsense. Defendant then put his head down, sat

there for a minute and said "I went off, I killed her, I took the old white lady's car." Defendant continued saying that he wanted the car so he brought a disguise (a heavy jacket and ski mask) to school, went to the Walgreen's parking lot, approached the car and shoved the old white lady in the car. Defendant said she was struggling and tapping on the window so he held her down. He pulled behind the beach house, pulled her out and "just lost it," hitting her with a garbage can several times. He then drove off. Defendant told Baker that he had destroyed the disguise, except for the pair of gym shoes he was wearing which were under his bed at home. Baker participated in the execution of the search warrant of defendant's home which recovered a pair of Nike gym shoes. Despite the confession, defendant was released from Area 2 that evening. Defendant was not charged with the homicide until one year later.

On cross-examination Baker testified that defendant was originally interviewed as a witness. However, after he viewed the lineup, defendant was not free to leave until they had straightened out why he was unable to identify Pugh. Baker admitted that defendant was alone in the interview room with him and another detective, that he knew defendant was only 15 years old and that although youth officers were present that evening in Area 2, none were present during the interview. Baker additionally testified that defendant did not give a written statement.

At this point of the trial, the State informed the court that the footprint expert it was going to have testify, William Bodziak, had not yet arrived. As it was early in the day, the defense agreed to proceed with its case and allow the State's expert to testify the next day. The jury was informed of this. William Bodziak subsequently testified that he is a self-employed forensic consultant in the area of documents, footwear and tire impression evidence. Bodziak testified that from 1970 until 1998 he was a special agent for the FBI. Bodziak spent many of those years at the FBI in the

laboratory division developing classes of footwear and tire impressions. Bodziak has been qualified as a footwear, tire and document examiner since 1976. He had testified as a footprint expert more than 100 times.

Bodziak testified that defendant's Nike shoes were sent to him for analysis in 1995. Bodziak evaluated the photographs of the foot impressions from the scene by creating a series of test impressions including overlays. Bodziak testified that, in regard to the left shoe:

> "I found that the size and the design corresponded. I found the general condition corresponded; but I wasn't able to find any of the accidental random characteristics that would enable a positive identification. Based on this examination, I am of the opinion that this shoe could have made this impression; but there was insufficient detail and accidental characteristics of an identifying nature that would have enabled me to go further and say this shoe positively made it."

Bodziak testified similarly with regard to the right shoe as well.

B. Defendant's Case

Before Bodziak arrived, Paul Sahs testified that he was a retired police officer self-employed as a forensic consultant. Sahs also made test impressions and compared defendant's shoes with the impressions left in the sand at the scene of the crime. When questioned about the left shoe, Sahs testified that "his opinion was that the known shoe did not make the impression in the sand because of various differences." Sahs testified similarly with regard to the right shoe as well.

Denise Davis testified that on November 23,

1994, as she approached the intersection at Lake Park Street and 55th Street, she saw an older white female walk towards a greenish Oldsmobile in the Walgreen's parking lot. Davis saw a black male, medium build, wearing a skull cap and thick glasses, with a mustache and a little fuzzy gray and black beard, approach the woman from behind. Davis testified that she was approximately 10 feet from this man and had a good opportunity to see his face. The man pushed the lady in the car into the passenger seat as he got into the car. The man was hitting the woman and she was screaming. The car then pulled out of the lot and headed west on 55th Street. Davis testified that 10 to 15 seconds had elapsed from the time the man got into the car until the car drove off. Davis ran to a police car parked on 53rd Street and told them what she had witnessed.

The next day, Davis went to Area 2 and provided detectives with a description of the man she saw. Davis told the police she would be able to identify the individual who abducted the woman from the parking lot. On December 1, Davis returned to Area 2 and viewed a lineup. Davis identified James Pugh as the man she saw involved in the carjacking. At trial, Davis testified that defendant was not the man she saw abduct the victim from the Walgreen's parking lot. Davis admitted on cross-examination that she believed she had seen the abductor on two occasions after the incident.

Detective Paul Bernatek testified that he arrested James Pugh on December 1, 1994, on unrelated charges. Bernatek observed bruising on the palms of both of Pugh's hands when he was arrested. Photographs of Pugh's hands were taken and introduced into evidence at trial. Bernatek testified that Pugh was placed in three lineups on December 1. Bernatek stated that both Denise Davis and Gregory Talbert positively identified Pugh, while Mr. Lopez stated that, of the participants in the lineup, Pugh most resembled the abductor.

Dr. Darryl Graden testified that he was a dentist

who examined defendant's teeth several times from 1993 to 1997. Graden testified that defendant did not have an overbite or a space between his teeth, as did the person described by witness Lopez.

Dr. Jerry Browning testified that he was a family physician who examined the defendant in 1994 and 1995. Browning testified that defendant did not require the assistance of glasses. Browning additionally testified that at the time of trial defendant was heavier and taller than he was in 1994.

John Eierman, a police officer, testified that when he interviewed Theodius Jackson on April 15, 1997, Jackson told him that he was afraid of being charged with a crime when the Cook County State's Attorney's office interviewed him in connection with the Orlinsky murder.

Douglas Cunningham, defendant's father, testified at trial and at the motion to suppress hearing that when he brought defendant to Area 2 to view the lineup, he told detectives that he did not mind if defendant was questioned concerning the lineup, "but anything other than viewing a lineup, I wanted to be present; and if he needed an attorney, I would want an attorney present." Douglas testified that an hour elapsed after his son was taken to view the lineup and when he was finally brought into the interview room where defendant was sitting, defendant's eyes were puffy, his face was red and swollen and it looked like he had been crying.

Eliot Cunningham, defendant's uncle and a former Chicago police officer, testified that he was with Douglas Cunningham at Area 2 while defendant was in the interview room with the detectives. Eliot testified that defendant's parents were denied access to him during this interview.

Lonnie Randolph testified that on December 14, 1994, he was a practicing attorney and State Senator. Randolph received a phone call from another attorney and he proceeded to Area 2 at approximately 10:30 p.m. on the 14th. After speaking with Mr. and Mrs.

Cunningham, the police made Randolph wait a half hour to 45 minutes before he was allowed to see the defendant. Randolph testified that when he was finally allowed to see defendant, defendant was obviously distraught, his face was puffy. Randolph said that defendant looked scared. Randolph also testified that defendant did not wear any glasses and did not have any facial hair.

Finally, Robert Louise Cunningham, defendant's mother, testified that in 1994 defendant did not wear glasses, did not have facial hair, did not have an overbite and did not have a space between his teeth.

The jury deliberated for 10 ½ hours and returned verdicts of guilty of first degree murder, aggravated vehicular highjacking, aggravated kidnaping and robbery. Defendant was sentenced to concurrent sentences of 80 years for first degree murder, 30 years for aggravated vehicular highjacking, 15 years for aggravated kidnaping and 7 years for robbery. Defendant now appeals.

II. ANALYSIS

A. Defendant's Confession

Defendant asserts that the trial court should have suppressed his confession because it was not voluntary. The State bears the burden of proving, by a preponderance of the evidence, that a confession was voluntary. People v. Gilliam, 172 Ill. 2d 484, 501 (1996). To determine the voluntariness of a confession, including one from a juvenile, the court looks to the totality of the circumstances. Gilliam, 172 Ill. 2d at 500. Factors to consider include individual aspects of the accused (age, intelligence, background, experience, mental capacity, education, physical condition, and experience with the criminal justice system), and the nature of the interrogation (the legality and duration of the detention, the duration of the questioning, and any physical and mental abuse by police). Gilliam, 172 Ill. 2d at 500-01. No one factor is dispositive. Gilliam, 172 Ill. 2d at 500. "The benchmark of voluntariness is not

whether the defendant would have confessed in the absence of interrogation but, rather, whether the defendant's will was overborne at the time of the confession." People v. Plummer, 306 Ill. App. 3d 574, 584 (1999), citing People v. Brown, 169 Ill. 2d 132, 144 (1996).

Additionally, we have recognized that the taking of a juvenile's confession is a "sensitive concern." In re G.O., 191 Ill. 2d 37, 54 (2000). Because of this, the "greatest care" must be taken to assure that the confession was not coerced or suggested and that "it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." In re G.O., 191 Ill. 2d at 54. This court also recognizes a "concerned adult" factor in considering whether the juvenile, either before or during interrogation, had an opportunity to consult with an adult interested in his welfare. In re L.L., 295 Ill. App. 3d 594, 600-01 (1998). The absence of a parent is one factor to consider but is not, itself, determinative of whether the juvenile's confession should be suppressed. People v. Pogue, 312 Ill. App. 3d 719 (1999). Similarly, the absence or presence of a youth officer is not alone determinative of voluntariness, but is a material factor to consider. In re Lashun H., 284 Ill. App. 3d 545, 555 (1996).

The key is whether the absence of an adult interested in defendant's welfare contributed to the coercive circumstances surrounding the interrogation. In re D.C., 244 Ill. App. 3d 55, 61 (1992). Police conduct that frustrates a parent's attempt to confer with a juvenile is a significant factor in determining voluntariness of a juvenile's confession. In re Lashun H., 284 Ill. App. 3d at 552. In reviewing a defendant's confession, we will accord great deference to the trial court's factual findings, and we will reverse those findings only if they are against the manifest weight of the evidence. However, we will review de novo the ultimate question of whether the confession was voluntary. In re G.O., 191 Ill. 2d 37, 50 (2000).

In G.O., our supreme court noted that G.O., a 13

year old, was arrested in the late hours. When initially questioned, he denied involvement in the crime. He was not questioned again until four hours later. There was no evidence G.O. was abused or failed to receive his Miranda warnings. G.O.'s mother was not told he was under arrest for murder or that he would be asked to waive his rights by the officers when they called her. A youth officer was present during the second questioning. G.O. was never asked to sign a formal waiver of his rights, his statements were never reduced to writing, and the statements were never given to him to review or sign.

On appeal, the appellate court reversed the trial court's denial of the defendant's motion to suppress statements. In re G.O., 304 Ill. App. 3d 719 (1999). Our supreme court reversed the appellate court, holding:

> "We agree with the State that a juvenile's confession should not be suppressed simply because he was denied the opportunity to confer with a parent or other concerned adult before or during the interrogation. Nevertheless, we believe that this is a factor that may be relevant in determining whether a juvenile's confession was voluntary. This is particularly true in situations in which the juvenile has demonstrated trouble understanding the interrogation process, he asks to speak with his parents or another 'concerned adult,' or the police prevent the juvenile's parents from speaking with him." In re G.O., 191 Ill. 2d at 55.

Under the facts of that case, the supreme court held the confession was voluntary. G.O. never asked to speak with a parent, the police never frustrated the mother's attempt to confer with him, G.O.'s detention was valid, G.O. was intelligent and did well in school, and G.O.

conceded there had been no physical coercion.

Similarly, in another recent supreme court case, People v. Morgan, 197 Ill. 2d 404 (2001), a 14 year old's confession was held to be voluntary although he did not confer with an interested adult prior to or during his interrogation. In that case the defendant confessed at the crime scene to killing his grandparents. He repeated the confession at the police station. The court noted that the defendant was an average student, the defendant was not abused or threatened during the interview, the defendant was given his Miranda rights, and the defendant wanted to tell what happened when he approached the officer at the scene. Further, when he was being interviewed, defendant was not handcuffed and the questioning only lasted 30 minutes each time. The court also noted that although defendant's parents were not contacted, that did not render his confession involuntary. Defendant told the interviewing officers that his legal guardians were his grandparents, and they were now deceased. The police did not obtain information regarding defendant's mother until they interviewed the defendant. Also, defendant never requested to speak with a concerned adult.

In a motion to cite additional authority, defendant cites People v. McDaniel, 326 Ill. App. 3d 771, (2001), where this court found that a 14 year old's confession was involuntary. In that case, defendant was arrested at 2 a.m. in his mother's home. Defendant was held in an interview room for five 5 hours and told he could not give a statement until the assistant State's Attorney arrived. Defendant's mother arrived at the police station at 2:30 a.m. and was denied access to her son until 8 a.m., after defendant confessed. This court held that the evidence demonstrated that the police frustrated defendant's mother's attempt to confer with him where a police officer's testimony corroborated that defendant's mother made numerous requests to see defendant and was denied. McDaniel, 326 Ill. App. 3d at 784-85.

Even more recently, this court in People v. Griffin, 327 Ill. App. 3d 538 (2002), held that a 15 year old's confession was involuntary where the police frustrated the parents' attempts to see him, he was denied the presence of a "concerned adult," and the circumstances of the detention were coercive. Defendant was arrested and brought to the police station at 11 p.m, detained for over 18 hours, was questioned for 30 minutes at 3 a.m., and did not make a statement until 5 p.m. the following day. Defendant's parents stayed at the station all night, which indicated an interest in their son. The police refused them access to their son. While the trial court did not believe that the parents repeatedly asked a woman at the front desk to see their son, it specifically found that the evidence that the police refused to allow defendant's parents to see their son was "unequivocal and uncontroverted." Griffin, 327 Ill. App. 3d at 546.

In applying these cases to the facts at hand, we find that defendant's confession was voluntary. First, defendant contends that his statements were involuntary where there was no concerned adult present during the confession. Specifically, he argues that his father was denied access to him and that no youth officer was present during the interview. Defendant argues that he testified that when he was brought into the interview room he asked to speak with his father and the detectives refused. Defendant also argues that his father testified that he told the detectives that he did not want his son questioned without an attorney or himself present. In its ruling denying defendant's motion to suppress, the trial court extensively reviewed the testimony at the motion to suppress and made extremely detailed findings of fact which take up 38 pages of the record. While G.O. had not been decided at the time the trial court ruled on this case, the trial court certainly complied with G.O.'s caution that, for the "great deference" "standard of review to function as it is intended, trial courts must exercise their responsibility to make factual findings

when ruling on motions to suppress." G.O., 191 Ill. 2d at 50.

The trial court specifically found the defendant's testimony that an attorney or parent's presence was requested prior to the inculpatory statement was "not believable." The trial court found that the police did not prevent defendant's father from speaking to him. The court also found there was not any "credible evidence in the record that Demetrius or any of his family members ever asked for or invoked Demetrius' right to counsel prior to making his statement." As the trial court noted, the record revealed that defendant was brought into the station two days before he made the incriminating statement as a witness. Defendant's parents were on notice of defendant's information and connection to this crime on December 12. Defendant was at home for the next two days during which his parents could seek an attorney's advice or counsel defendant regarding his involvement.

We acknowledge that defendant's father was present at Area 2 but not asked to be present during the interview. However, we are mindful of the other facts in this case as well. On December 12, the police were told by Borom and Jackson that they had gotten the car from defendant, who told them he had killed an old white lady when he took it. On that same day, defendant admitted to the police that he had indeed loaned the car to Borom and that he knew that it had been taken in a carjacking during which the owner was murdered. Defendant voluntarily came to the station with his father on December 14 to view the lineup. He came to the station at approximately 6 p.m. and was brought into the interview room by 6:30 p.m. Defendant was brought into the interview room directly following the lineup in order for the police to determine why he was unable to make an identification. Defendant's interview lasted under 30 minutes, with the actual statement lasting less than 10 minutes. The trial court found that defendant repeated his confession in the presence of his father. These facts

are directly opposite of the extreme facts present in Griffin and McDaniel and, therefore, those cases are easily distinguishable. The trial court found in the case at bar that the father's absence did not in any way contribute to or create a coercive atmosphere. It is exactly the function of the trial court to determine the credibility and the weight and inferences to be drawn from the evidence. People v. Golden, 323 Ill. App. 3d 892, 901 (2001).

Defendant asserts that his father had requested to see defendant for over two hours following the interview and that his uncle was denied access to defendant. Defendant also points out that an attorney was contacted and he was not allowed to see defendant until 30 or 45 minutes after he arrived, at around 11 p.m. Defendant argues that this evidence establishes that the police frustrated his right to have a "concerned adult" present during the interview. We disagree. As the trial court noted, this evidence concerns police conduct after the incriminating statements were made and "shed little light on the issue of voluntariness." It is important to note that the trial court precluded the State from eliciting any of the statements defendant made after he saw his father.

As for the presence of a youth officer, it is uncontested that youth officers were present in the police station but were not present during the interview. Again, we are mindful that although this absence is a significant factor in the totality of the circumstances analysis, there is no requirement that a youth officer be present when a minor is questioned. People v. Griffin, 327 Ill. App. 3d 538 (2002). In light of the other factors discussed, especially the evidence that defendant had an opportunity to confer with his father up to 30 minutes before the interview began, the interview lasted only 30 minutes and defendant confessed only 20 minutes after his status changed from witness to potential suspect, we do not feel that the absence of a youth officer created an atmosphere so coercive as to render defendant's confession

involuntary.

In addition, we note that our supreme court has found the "concerned adult" factor particularly relevant in the following situations: "the juvenile has demonstrated trouble understanding the interrogation process, he asks to speak with his parents or another 'concerned adult;' or the police prevent the juvenile's parents from speaking with him." In re G.O., 191 Ill. 2d at 55. Here, the evidence established defendant was attending a private high school and there was no evidence of "apparent learning or emotional disabilities." The trial court found that defendant did not ask to speak with a parent or "concerned adult" and that the police did not prevent defendant's parents from speaking to him. In making its findings, the trial court said that it he was applying the holding in In re I.I.C., 294 Ill. App. 3d 227 (1998), a case discussed by G.O., 191 Ill. 2d at 55.

The evidence also supports the trial court's finding that defendant was advised of his Miranda rights and understood them. Defendant was advised of his Miranda rights immediately prior to his incriminating statement and once again during the interview. The trial court found that "there is no credible evidence in the record that due to his age, education, physical, mental, emotional or psychological condition that he was not able to understand or knowingly waive his constitutional rights."

The trial court also specifically found defendant's testimony regarding verbal and physical abuse from the police to be not credible. Again, we defer to the trial court's determination of witness credibility. People v. Kolakowski, 319 Ill. App. 3d 200, 213 (2001).

Weighing against admission is defendant's age and his lack of any significant prior history with the justice system. However, considering the totality of the circumstances, we find defendant's confession was given voluntarily and free from coercion. We therefore hold that the trial court properly denied defendant's

motion to suppress his confession.

B. EXPERT TESTIMONY

1. Discovery violation

Defendant next argues that the trial court erred in denying the defendant's motion to bar all or a portion of the testimony of the State's footprint expert, Bodziak. Bodziak utilized the test impressions and overlays he made of the defendant's Nike shoes in formulating his opinion and in explaining his opinion during his trial testimony. Defendant contends that the State never informed him of the existence of the impressions and overlays and that they were not given to the defense until an hour before Bodziak testified. Therefore, defendant maintains that he was prejudiced where he called his footprint expert out of order, before Bodziak, unaware of the overlays.

In a criminal case, the provisions of Supreme Court Rule 412 require the State, upon a defendant's request, to disclose material and information within its possession or control, subject to certain qualifications, including, among other things, the names of the witnesses it intends to call at trial and any reports or statements of experts made in connection with the particular case, including the results of physical or mental examinations and of scientific tests and experiments or comparisons and a statement of the qualifications of the expert. 134 Ill.2d Rs. 412(a), (c). Rule 412 was substantively amended, effective March 1, 2201, but the amendments are not pertinent to this case. At the time of trial, Rule 412 further provided:

> "(f) The State should ensure that a flow of information is maintained between the various investigative personnel and its office sufficient to place within its possession or control all material and information relevant to the accused and the offense charged.
> (g) Upon defense counsel's request and

> designation of material or information which would be discoverable if in the possession or control of the State, and which is in the possession or control of other governmental personnel, the State shall use diligent good-faith efforts to cause such material to be made available to defense counsel." 134 Ill.2d Rs. 412(f), (g).

The State has a duty to use due diligence to ensure that it becomes aware of discoverable matters and must see that there is a proper flow of information between all the branches and personnel of its law enforcement agencies and legal officers. People v. Leon, 306 Ill. App. 3d 707, 712 (1999). The purpose of the discovery rule is to afford the accused protection against surprise, unfairness, and inadequate preparation and to afford the defendant an opportunity to investigate the circumstances from which the evidence arose. People v. Robinson, 157 Ill.2d 68, 79 (1993). Compliance with the discovery provisions is mandatory and will be excused only where the prosecutor was unaware of the existence of the statement or discoverable evidence and could not have become aware of it in the exercise of due diligence. Leon, 306 Ill. App. 3d at 713.

We hold the State did not violate Supreme Court Rule 412 in failing to provide the defense with Bodziak's overlays. First and foremost, defendant's discovery request did not ask for the impressions and overlays. The request sought only "any reports or statements of experts...made in connection with this particular cause including the results of physical or mental examinations, any specific tests, experiments or examinations." Defendant received Bodziak's report which contained his conclusions approximately four years before trial commenced. The defense had ample opportunity to contact Bodziak during that time frame to discover his methodology and to request any overlays. In addition, the defense never requested a

continuance when they became aware of the overlays in order to review them or discuss them with Bodziak or their own expert.

Even if we were to assume arguendo that the State violated the discovery rules, defendant's argument would still fail. In cases where the State has violated discovery provisions, the real issue a reviewing court must address is whether the discovery violation unfairly prejudiced the defendant and whether the trial court failed to eliminate the prejudice. People v. Weaver, 92 Ill.2d 545, 559 (1987). In this case, the defense suffered no prejudice. First, the jury was presented with Bodziak's conclusion that it was possible defendant's Nike shoe could have made the print, however, there was insufficient detail to determine with certainty that his shoe made the print. Defendant was able to cross-examine Bodziak on how he arrived at this conclusion. During cross-examination, defense counsel asked several questions regarding a book authored by Bodziak on shoeprint evidence. Defendant also presented direct testimony which rebutted Bodziak's testimony. Defendant's expert testified that defendant's Nike shoe could not have made the print. Defendant's expert had also utilized similar overlays and had received Bodziak's report long before trial. In addition, defendant was provided with the overlays before Bodziak's testimony began. While this did occur after his own expert had already testified, defendant did not seek to recall his witness, nor did he request a continuance at any point. The trial court did not abuse its discretion by refusing to strike Bodziak's testimony where the defendant suffered no prejudice from the discovery violation. See People v. Pursley, 284 Ill. App. 3d 597, 605 (1996).

2. Statistical theory

Defendant next claims that the trial court erred in allowing Bodziak to testify regarding a statistical theory. At issue is the following testimony on direct examination:

"Q: (Would you tell us how) the particular shoe size

would be diluted over the purchase in relation to the

purchase of other shoes.

A: The size or design?

Q: The size, design, and general condition.

A: All right. There is, according to the Footwear Industry of

America, there is approximately one and-a-half billion shoes

that are sold; whether they are imported sold or made in

America sold, but they are sold in the United States every

year. One and-a-half billion is an extremely large number.

In any particular design there may be a couple of hundred

thousands, for instance, of this shoe made each year; but in

a particular size, such as this is a size 12, there may be

only ten percent of that, so twenty thousand shoes. When you

divide the one and-a-half bill [sic] into twenty thousand, you

are talking about a very infrequent occurrence.

Q: One out of twenty thousand comes out to about- well,

the math, one out of every three hundred thousand?

A: I believe so.

Q: Does that sound about right?

A: Just as an- for example, yes."

The defense did not object to this testimony on direct examination. On cross-examination, defense counsel asked:

"Q: All right. Now when all is said and done with

everything that you have testified here today, you cannot say

that the shoes, 54-A and B created the unknown footprint in

the sand, could you?

A: That was my testimony; that is right.

Q: You can't do it. It could have been made by another

shoe?

A: It could have been made, yes.

Q: And while Mr. Sahs in his opinion said it was- they

did not make the impression, all you are saying is that it

could have; but it could have been made by another shoe?

A: It could have been made by another shoe in the same general

condition with the same mold characteristics and the same size

and design.

Q: And with regard to the number of shoes that were made,

you estimated was a one and-a-half billion shoes that come

into the country?

A: The latest information from the Footwear Industry of

America is that each year approximately 100-excuse me- one

and-a-half billion shoes are sold in this country.

Q: All right. And then your indication was that in a

particular shoe size it was 20 percent of-

A: Well, well for size 12, it is about 9.6, 9.7 percent;

so approximately 10 percent. And that hypothetical I gave,

if there were 200,000 pairs sold, then that would be 20,000.

Q: But that is exactly what it is is a hypothetical, right?

A: That is what-

Q: As you sit-

A: -I was asked, yes.

Q: As you sit there you have no idea how many of those

shoes were made, do you?

A: I don't think it is 200,000; it is probably less, but

I don't know the number now.

Q: You just don't know?
A: That is right."

On redirect, the State again elicited from Bodziak that of the approximated 1.5 billion shoes sold in the United States in a given year, he estimated that 20 thousand would be of the same size and design as defendant's shoes. When the State asked "So that is one out of every 300,000?" the defense said, "Objection Judge," offering no basis for the objection. The court overruled the objection, and Bodziak answered "yes." On re-cross, defense counsel again confirmed that Bodziak did not know how many of that particular shoe were made or how many of those shoes were in

the Chicagoland area at the time of the murder.

Defendant maintains that the State failed to lay the proper foundation for such statistical conclusions and, therefore, the trial court committed reversible error allowing the testimony in. At trial, defense counsel did not object at all to Bodziak's statistical testimony given on direct. On cross, defense counsel had Bodziak repeat the number of shoes sold in the United States annually and the approximate number of shoes with the same size and design as defendant's. The first time the defense objected to Bodziak's testimony regarding the comparison of those two numbers was on re-direct. This objection was made without stating its basis. Our supreme court has held that it is well settled "that the failure to object on proper grounds at trial results in waiver of the issue through 'procedural default.'" People v. Lewis, 165 Ill. 2d 305, 336 (1995). Further, defense counsel had Bodziak repeat on cross-examination the testimony about which he complains now. A criminal defendant cannot complain on appeal about the introduction of evidence which he procures or invites. People v. Williams, 192 Ill. 2d 548, 571 (2000). Finally, defendant did not object to Bodziak's statistical testimony on direct. An issue which has not been objected to during trial and raised in a post-trial motion is not preserved for appeal. People v. Fender, 325 Ill. App. 3d 168, 175 (2001).

In the instant case, Bodziak testified that the numbers he was providing were approximations based on information obtained from the Footwear Industry of America as well as from Nike. Bodziak did not testify to, or claim to have, exact and certain numbers of shoes produced in this country. Defense counsel had the opportunity, and took it, to expose this fact during cross-examination. The defense presented their own shoeprint expert who testified that Nike used several molds to produce the type of shoe worn by defendant and which left the shoe print found at the scene. Bodziak testified, as defendant himself points out, that he did not know exact numbers of shoe production,

and that the figures he was testifying to were not specific to the type of Nike Air Bound shoes found in defendant's house. Bodziak testified that any figure resulting from dividing the number of shoes sold in the United States in a year by the number of shoes made of a particular design should be treated as an "example", not as a conclusive, reliable number. Bodziak admitted his numbers were estimates. Defense counsel had the opportunity to minimize the effect of Bodziak's testimony during cross-examination. Also, the jury was repeatedly informed that Bodziak's conclusion determined only that defendant's shoe "could have" made the print. Based on the record, we find that the issue of Bodziak's testimony regarding "statistical analysis" has been knowingly waived.

In People v. Campbell, 146 Ill. 2d 363 (1992), our supreme court held that under appropriate circumstances, shoeprint evidence may be as reliable and trustworthy as any other evidence. In People v. Aquinaga, 231 Ill. App. 3d 153 (1992), the State presented testimony from a forensic examiner from the Chicago Police Crime lab. That investigator testified that there were 10 individual characteristics and unique markings found on the defendant's shoes and on shoeprints found at the scene of the crime, including separated lines, broken ridges, notches and cuts. In the investigator's opinion, only the defendant's shoe could have made the impression on an envelope found near the victim's apartment. "This shoeprint evidence, standing alone, was sufficient to support a conviction for murder." People v. Aquinaga, 231 Ill. App. 3d at 174; citing People v. Campbell, 146 Ill. 2d 363 (1992). The defendant in Aguinaga had called a manufacturer's agent for the exclusive seller of Pony athletic wear in northern Illinois. The agent testified that approximately 2,000 pairs of shoes with the same design and size as defendant's had been sold in the Chicagoland area. For analysis of case law discussing the admissibility of footprints as evidence, the issue is thoroughly discussed in *Footprints as Evidence*, 35 A.L.R.

2d 856, and its many updates.

Defendant cites People v. Harbold, 124 Ill. App. 3d 363 (1984), for the proposition that is improper to introduce statistical probabilities for the purpose of establishing a historical fact. Harbold addressed a situation in which the State's experts testified that they analyzed blood samples prepared from physical evidence in the case and typed those samples according to ten systems of genetic characteristics or "markers." One of the experts testified that given the ten groups of characteristics tested and the percentage of population known to display each characteristic..." the probability of an accidental match is less than one in 500." Harbold, 124 Ill. App. 3d at 367. The appellate court reversed defendant's conviction holding that, while experts may "testify to the percentage of the population exhibiting certain combinations of blood characteristics," it was improper to express "the similarity between the perpetrator and defendant in terms of the likelihood of a random match." Harbold, 124 Ill. App. 3d at 383.

We note that in People v. The Almighty Four Hundred, 287 Ill. App. 3d 123 (1997), this court affirmed the admission of a statistical probability estimate testified to by a DNA expert. Citing People v. Miller, 173 Ill. 2d 167, 188-89 (1996), this court held that the trial court did not abuse its discretion in allowing the DNA expert to testify that the likelihood that the blood on the defendant's pants came from someone other than the victim was less than one in a billion. People v. The Almighty Four Hundred, 287 Ill. App. 3d at 129-30.

We note that Bodziak's testimony that approximately 1.5 billion shoes are sold in the United States and 20 thousand of those are of the same design and size as the defendant's shoes was not used in terms of the likelihood of a random match, as condemned in Harbold. The resulting estimated number arguably described a percentage of the "shoe population" exhibiting certain characteristics. However, comparing

the characteristics of shoes with the combinations of blood characteristics in the population requires quite a leap. Our research has not found a reported case discussing the admissibility of statistical probabilities in a case involving shoeprint evidence. While this issue was deliberately waived in the instant case, courts should be concerned that such testimony may have an impact on a jury out of all proportion to its true value.

For the foregoing reasons, in this opinion and for the reasons set out in our Rule 23 order issued contemporaneously with this opinion, we affirm defendant's convictions and sentence.

Affirmed.

CAMPBELL, P.J. and REID, J., concur.

APPENDIX B

TRIAL COURT'S RULING DENYING THE MOTION TO SUPPRESS

In The Circuit Court of Cook County, Illinois
County Department, Criminal Division

People of the State of Illinois,

Respondent,

vs.96 CR 4582

Demetrius Cunningham

Petitioner,

Ruling On Petitioner's Motion To Suppress Statements

Petitioner,, Demetrious (sic) Cunningham, has moved to suppress, as evidence herein, all statements made by him to law enforcement personnel involved in these proceedings. Respondent has agreed not to use, either as substantive evidence or as impeachment evidence, any statement that was made after his first inculpatory conversation with Detective Michael Baker at Area 2 Violent Crimes Headquarters subsequent to viewing a lineup on December 14, 1994 at approximately *6:50* p.m.. As grounds for suppression, Cunningham asserts that he was denied the opportunity to consult with his father prior to and during questioning; that he was denied the right to have counsel

present during his interrogation, that he was not advised of the Miranda rights prior to questioning, or even if he was so advised, that because of his juvenile age, physical, psychological, mental, educational and emotional capacity and condition, that he was not capable of understanding and knowingly waiving those rights; that the statement was made after he had elected to remain silent and consult with counsel; that the statement was the product of confronting him with material misrepresentations; and, that the statement was involuntary in that he was physically and mentally coerced by police officers in that he was stuck about the body, called names and promised that if he did not admit to killing the victim he would be put in jail for the rest of his life, never seeing his family again, but if he made a statement implicating himself in the murder, because he was a juvenile, the most he would be sentenced to was one, two or three years in the department of corrections.

The proofs having been concluded and the arguments of counsel considered, the Court enters the following findings of fact and conclusions of law pursuant to Section 114-11 of the Code of Criminal Procedure. 725 ILCS 5/114-11 (West 1996).

Demetrious Cunningham is charged with the first degree murder, aggravated vehicular hijacking, vehicular invasion, robbery, aggravated kidnaping, and other related charges, of Elsie Orlinsky, in Chicago, Cook County, Illinois, on November 23, 1994.

Evidence Presented

The relevant testimony of the witnesses shall be summarized in the order of their involvement.

Detective Michael Baker, a Chicago police detective, testified on December 12, 1994, during the course of the

investigation pertaining to the murder of Elsie Orlinsky, he learned that the Indiana East Chicago Police Department had arrested two individuals in Elsie Orlinsky's car. Upon arriving at the East Chicago Police Department, Detective Baker learned that Lamont Borum and Derrick Glasper were these two persons. During questioning, Borum stated that Demetrious Cunningham had admitted stealing the car and murdering Ms. Orlinsky. Coincidentally, at this same time, Detective Baker learned that Cunningham was in the same police department on an unrelated matter. Cunningham's parents had brought Cunningham into the police station so that the police could talk to him about his repeated unauthorized taking of the family car.

In the presence of Doug and Robert Cunningham, Demetrious's parents, an East Chicago police officer, and Detective Solecki, Detective Baker has a conversation with Demetrious about Ms. Orlinsky's car. Demetrious was not advised of his Miranda rights during this conversation. During this conversation, Demetrious did not implicate himself in the murder of Ms. Orlinsky but did admit to being in possession of her car. He gave a good description of the person from whom he had received the victim's car, said he had seen a composite sketch of that person on television, and that he could take the detectives to the location where he received the car near 61 St and Dorchester in Chicago, Illinois. Detective Baker knew at the same time, there was an individual in custody at Area 2 Violent Crimes Headquarters, named James Pugh, who he believed matched that description. Detective Baker informed the Cunninghams that he would like Demetrious to go the Area with him and eventually view a lineup. This was agreeable with the Cunninghams. Arrangements were then made for Demetrious to accompany Detectives Baker and Solecki, to

first go the location where Demetrious had gotten the car near 61st and Dorchester, and then to meet his parents at Area 2 Headquarters. After going to the location where Demetrious said he got the car, Demetrious was delivered to his parents at Area 2. The Cunninghams were informed by Detective Baker and later by Assistant State's Attorney Ferraci, that it would be necessary for Demetrious to return to the Area the next day, December 14th, to view a lineup. The Cunninghams agreed and left the Area with Demetrious.

On December 14, 1994, at 6:00 p.m., Doug Cunningham and his son, Demetrious, arrived at Area 2 for the purpose of viewing a lineup. His father was not permitted to accompany him to the viewing of the lineup which was conducted at approximately 6:15 p.m. and which was concluded at approximately 6:25 p.m.. Detective Baker testified that it is normal Chicago Police Department procedure not to allow others to accompany a witness to the viewing of a lineup. After being unable to make any identification during the lineup, at about 6:30 p.m., Detective Baker and Detective Karl accompanied Demetrious to a nearby interview room where they had conversation with Demetrious for no more than 30 minutes. Immediately upon entering the interview room Demetrious was told there was a "problem with the lineup." Detective Baker additionally told Demetrious that he didn't identify the man he saw on T.V. who fit the composite sketch and that "it was strange that he couldn't identify him" and that "there was something wrong here." Demetrious was also confronted at that time with statements from Borum and a Mr. Jackson, wherein Cunningham had admitted his involvement in the crime to them. Detective Baker testified that Demetrious was still considered a witness and not a

suspect at this time, and that even though there were youth officers in the Area, none were notified. Demetrious was told by Detectives Baker and Karl that he was not telling the truth. Approximately twenty minutes after entering the interview room, and after denying his involvement in the crime several times and further "expounding upon his knowledge of the potential offender" and being told that his account was unbelievable, Demetrious said "he wanted to tell the truth." Detective Baker testified that he knew that Demetrious was "lying" and that he had something to say, but that he didn't know what he might say. At approximately 6:50 p.m., Demetrious was advised of his Miranda tights and additionally, that because of his age and the nature of the offense, that he could be charged as an adult. Demetrious stated that he understood each of these rights. Prior to this conversation, Detective Baker knew that Demetrious was 15 years old and a student at Mount Carmel Catholic High School. Detective Baker testified that Demetrious was advised of his rights at this time prior to any admission because at this stage of the investigation he "wasn't sure" of what he had or what Demetrious was going to say. Up to this point in the investigation, Demetrious was only thought to be a fully cooperating witness; James Pugh, standing in the line-up was the suspect. Demetrious put his head down on the table for a "minute or two" after stating that he was going to tell the truth. After that minute or two, Demetrious was again told that his first two statements to the detectives were not believable, and he again stated that "I am going to tell you the truth, I did it, I want to get it off my chest." Demetrious was advised of his Miranda rights a second time and again acknowledged that he understood them. At approximately 6:50 p.m., again stated that he wanted to tell the truth. Demetrious made inculpatory statements to Detectives

Baker and Karl during a conversation lasting no more than ten minutes. Demetrious was then told that he should tell his father the truth. Demetrious said he didn't want to tell his father and asked that the detectives do it. At 7:00 p.m., Demetrious's father was brought into the interview room and Demetrious told his father that he did it, saying, "I took the car. I killed the old lady." The father then left the interview room and the interview was ended. Demetrious Cunningham was then placed under arrest for the murder of Elsie Orlinsky. Detective Baker additionally testified that at no time was Demetrious ever denied the right to confer and consult with an attorney or parent prior to or during the interview; that he never invoked his right to remain silent or to request a parent or attorney; that neither Detective Baker or Karl ever shouted at Demetrious or called him "motherfucker" or "nigger"; that no promise was made that in exchange for a confession he would receive a one, two or three year sentence because he was a juvenile; that he was never threatened that if he did not confess to the killing he would be put in jail for the rest of his life and never be able to see his family or that Demetrious would receive a sentence of one, two or three years in prison if he confessed because of his juvenile status; and that Demetrious was never slapped or physically mistreated or psychologically coerced in any way to induce the statements.

In support of the motion to suppress, petitioner presented the testimony of himself, his mother and father, Douglas and Robert Cunningham, his uncle, Elliott Cunningham, Estelle Powell, and Lonnie Randolph.

Demetrious Cunningham testified that on December 12, 1994 he was 15 years old, a sophomore in high school. He has now received his G.E.D. high school diploma. Prior to

December 12, 1994, he had been arrested once before for a curfew violation and released from police custody within thirty minutes.

On December 12th, he was taken, by his parents, to the East Chicago police station for joy riding in his parent's car. While at the police station, he was advised by Detective Baker and his partner, in the presence of his parents, that the East Chicago Police caught three young men in a car that was involved in a murder, and that those men had told the police that they had gotten the car from him. Police told Demetrious and his father that he was going to be questioned only as a witness and not as a suspect and that a lawyer was not necessary, when questioned by his father. Demetrious then had a conversation with Detective Baker and his partner, in the presence of his parents, during which he told them that he had the car and how he had come into possession of it. He further told the police that he could show them where he had gotten the car and could identify the person from whom he had gotten the car in a lineup and that this person looked like a "photo" he had seen. Prior to this conversation he was not advised of his Miranda rights. After this conversation he was permitted by his parents to accompany Detective Baker and his partner to the Chicago location at 61st and Dorchester, where he showed them where he had gotten the victim's car. Alter so doing, he was returned to his parents at Area 2 Headquarters in Chicago and permitted to go home with instruction to return to the Area on December 14th at 6:00 p.m. to view a lineup.

On December 14th, at 6:00 p.m., Demetrious and his father arrived at Area 2 to view a lineup. Again, in response to questioning by his father, Detective Baker stated that Demetrious was only a witness, not a suspect, and as such

no attorney was needed. Within minutes, Demetrious viewed the lineup containing the suspect, but did not make any identification. Demetrious asked to speak to his father and was refused permission to do so; he was then placed in an interview room behind a locked door. Detective Baker asked him why he couldn't pick anyone out of the lineup and "what was up." After being left alone for ten minutes, Detective Baker returned to the room with Detective Karl. Demetrious repeatedly asked to see his father and a requested a lawyer. Demetrious was told that his father had gone and left him alone at the station.

Demetrious testified that while in this room for approximately thirty minutes, Detective Baker in an angry tone of voice, ten or twelve times said "listen here you little motherfucker. We are not going to believe you. You're lying and we know you killed the little fucking lady. You'll never, ever see your parents again if you don't tell us that you killed this fucking lady. If you tell us that you killed this lady, you're only going to get one, two or three years because you're a minor." While saying these things, Detective Baker slapped Demetrious eight times on both sides of his face. Demetrious was called various names including "motherfucker, nigger, jag off, asshole, son of a bitch, piece of shit and ball sucker." As a result of these actions, Demetrious stated that he began crying, became "scared and afraid" and "broke down." After thirty minutes, Detective Baker left the room and returned with Demetrious's father. Demetrious was told to repeat what he had told the detectives to his father. As Demetrious began telling his father what he had told the detectives, his father became angry, demanded that his son be given an attorney and told Demetrious to stop talking. The detectives pushed his father out of the room. After that, a state's attorney came into the room who advised him of his rights. He did not

request a lawyer at that time because he feared being called names and being hit again. As he was giving his statement to the state's attorney, his father ran into the room and again told them to stop the questioning. He was again forced from the room.

Douglas Cunningham, the defendant's father, testified on December 12th, he, his wife Robert, and Demetrious were at the East Chicago Police Department in Indiana on an unrelated matter when they were advised that two Chicago police officers wished to speak to Demetrious. They were informed that two youths were arrested joy riding in a car, questioned and stated that Demetrious had given them the car. Douglas refused to let the police talk to his son alone and asked if Demetrious needed a lawyer. He was advised that someone else was in custody for the crime and that Demetrious was only a possible witness and that a lawyer was not necessary. Douglas gave his permission for them to speak to Demetrious. Demetrious told the police officers that he knew about the car. He stated that, in Chicago, the person who was driving the car had jumped out of the car, dropped the keys, and that he (Demetrious) had picked up the keys and drove the car home. Demetrious told the police that he could show them the location where he had gotten the car. The Cunningham's then gave permission, as a witness, to take Demetrious back to Chicago for the purpose of pointing out where he had gotten the car. Demetrious left with the two detectives and the Cunninghams returned home. As arranged with the detectives, the Cunninghams went to Area 2 at about 10:00 p.m. on December 12th, and picked up Demetrious. Further arrangements were made for Demetrious to view a lineup on December 14th at about 6:00 p.m.. On December 14th, at 6:00 p.m., Douglas and Demetrious returned to Area 2 for the purpose of

Demetrious looking at a lineup. Douglas asked to accompany his son while viewing the lineup and was denied. He again asked if an attorney was needed and was again told that Demetrious was only a witness and that an attorney was not needed. Douglas then told Detective Baker that he had no problem with Demetrious viewing the lineup but that he did not want the detectives to discuss anything besides the lineup without himself or an attorney present. Again he was told that someone else was in custody as the suspect in the case. Demetrious was then taken to view the lineup at approximately 6:15 p.m.. At approximately 7:00 p.m., Douglas left the waiting area and demanded to know where his son was. At approximately 7:30 p.m., Detective Baker approached Douglas and told him that Demetrious had something to tell him. Douglas followed Detective Baker into an interview room where Detective Baker's partner and Demetrious were seated. Demetrious had his head down on the table, his eyes were puffy, his cheeks were red and puffy, and it appeared as though he had been crying. Detective Baker told Demetrious to tell his father what he had said. Demetrious began to talk and Douglas told him to stop. Douglas became angry because his son had been interviewed, demanded an attorney, and was pushed out of the room. He was put into another room. Douglas was then informed that the State's Attorney was on his way to talk to Demetrious. After five minutes, Douglas left that room, pushed open the door of the original interview room, and saw several people questioning Demetrious. He again demanded that the questioning stop, that an attorney be present and that he be allowed to be present. Douglas was again pushed out of the room. From outside the room, Douglas heard his son say "I didn't do it; I didn't do it. You can kill me if you want to. I didn't do it." Douglas then used the telephone to call his wife and later his brother, Elliott

Cunningham, to advise them of what was happening. Approximately two hours later at 9:30 or 10:00 p.m., Robert and Linda Baron arrived at the Area. They demanded to see Demetrious and were informed by Detective Baker that since they were not attorneys they would not be permitted to see him or talk to him. At approximately 1:30 a.m. on December 15th, attorney, Lonnie Randolph, arrived at the area and was allowed to speak to Demetrious.

Robert Louise Cunningham, Demetrious's mother, testified consistently with Douglas, to the same matters that she was present for.

Elliott Cunningham, the defendant's uncle and a former East Chicago police officer, testified that at approximately 9:00 p.m., December 14th, he received a call from a panicked Douglas Cunningham, his brother, advising him as to what was going on. He went to Area 2 and asked to speak to Detective Baker. While he was waiting, he heard Demetrious, behind a closed door, crying. He confronted other police personnel, and was denied access to Demetrious. After a ten minute wait Detective Baker arrived and after conversation, denied them access to Demetrious because they were not attorneys.

Estelle Powell testified that she is an attorney licensed to practice law in the State of Indiana. On December 14th at approximately 9:30 p.m., while at home in bed, she received a telephone call from Douglas Cunningham. She knows the Cunningham family from church. She was informed by Douglas that he was at the police station, that the police wanted Demetrious to view a lineup, that they were now interrogating him, that he asked them to stop the questioning, that they refused, and that they would not let

him see his son. Being given the telephone number of the police station, she called at 10:00 p.m., identified herself as Demetrious's attorney and asked that the questioning cease. The police officer advised her that he couldn't be sure that she was really an attorney and refused to satisfy her requests. Five to ten minutes later, she called the same number, made the same requests and was again denied. Between 10:15 p.m. and 10:40 p.m. Ms. Powell telephoned attorney Lonnie Randolph and advised him of the situation. She then called Douglas Cunningham back and told him that an attorney was on the way to the Area. Sometime after 11:00 p.m., attorney Randolph telephoned Ms. Powell and stated that he was at the police station.

Lonnie Randolph testified he is an attorney. At approximately 10:15 p.m., December 14th, 1994, he was at home in bed, when he received a telephone call from Estelle Powell informing him that a family friend, Demetrious Cunningham, was in jail in Chicago, asking for his assistance. He then traveled to Area 2 police headquarters, arriving at 11:00 to 11:15 p.m.. After introducing himself to the Cunninghams he identified himself as Demetrious's lawyer to police personnel and asked to see his client. Approximately 30-45 minutes later, he was escorted to Demetrious. Demetrious was alone in the interview room. It appeared as though he had been crying; he appeared upset, distraught and scared. Demetrious told his attorney that the police had struck him. Mr. Randolph never made formal complaint with regard to the alleged physical abuse of Demetrious. Demetrious was released from police custody a couple of days later.

The State, in rebuttal, presented the testimony of two additional witnesses.

Peter Ferraci, an assistant State's attorney, testified on December 12th, he was assigned to the felony review unit. He was called to Area 2 and met Demetrious and his parents. He had been informed by Detectives Baker and Solecki, that James Pugh, the suspect in the case had already been charged with the Aggravated vehicular invasion of Elsie Orlinski's (sic) car, and that Demetrious was a witness who had given Pugh the car. Demetrious gave his account to Ferraci also describing James Pugh. Douglas Cunningham was present for this discussion. Demetrious was asked to return the next day at 6:00 p.m. to view a lineup, and he agreed. Mr. Ferraci was never advised by Detectives Baker or Solecki that Demetrious was a suspect in the case.

Michael McHale, also an assistant state's attorney, testified on December 14, 1994, he arrived at Area 2 at approximately 6:00 p.m. to interview a Mr. Borum and Mr. Jackson in connection with the Orlinski homicide. At the time of his arrival, he did not know that Demetrious was at the Area. Approximately 7:40 p.m. he was advised by Detective Baker that Demetrious was making a statement and that he should talk to Demetrious right away. McHale went to the interview room where Detective Karl, Frank Marek (an assistant state's attorney), youth officer Lux and Demetrious were waiting. He had a conversation lasting 25-30 minutes with Demetrious. At no time did Douglas Cunningham, or anyone else, enter the interview room. McHale never observed Demetrious crying; he appeared normal; his eyes were not red or puffy.

Finding of Fact

From the credible evidence presented, this court makes the following finding of fact.

On December 12, 1994, Detective Baker and his partner, upon learning of the recovery of the murdered victim's car, in East Chicago, Indiana, traveled to Indiana and spoke with the occupants of that car and learned that they had received the car from Demetrious Cunningham. Demetrious, coincidentally, was in the same police station on an unrelated matter. Upon questioning, in the absence of Miranda warnings, in the presence of his parents, Demetrious revealed that he was in possession of the car, gave a good description of the person from who he received the car, had seen a composite sketch of that person on television, could identify that person if seen again, and that he could take the officers to the location in Chicago where he had received the car. With the knowledge of his parents and voluntarily, ***as a witness and not as suspect***, he accompanied the detectives to Chicago to assist in the investigation. Later, that same evening, he was returned to his parents at Area 2 with instructions to return on December 14th at 6:00 p.m. to view a lineup; a lineup that the detectives believed would contain the actual suspect, James Pugh.

On December 14th at 6:00 p.m., Demetrious and his father returned to Area 2 to view the lineup. Douglas Cunningham asked to accompany his son, (***as witness and not as a suspect***), to view the lineup and was refused by Detective Baker because it was not proper police procedure. The lineup was conducted between 6:00 p.m. and 6:25 p.m. and Demetrious was unable (or unwilling) to identify any of the participants. At 6:30 p.m., Demetrious was moved into a nearby interview room and in the absence of Miranda warnings was asked questions about his inability to identify the known suspect, James Pugh. Demetrious was told that there was a "problem with the lineup", "it was strange that he couldn't identify" the suspect, "there was something wrong here", and that he was not telling the truth. After

Demetrious was asked to "expound upon his knowledge of the potential offender" and again was told that his account was unbelievable, Demetrious indicated that he would tell the truth. At this time, approximately 20 minutes after entering the interview room, Detective Baker, believing that Demetrious had something to say, but not knowing what he might say, advised Demetrious of his constitutional rights per Miranda, including the fact that because of his age he could be charged as an adult. At this time, Demetrious was still being questioned *as a witness and not as a suspect.* Demetrious then stated "I did it. I want to get it off my chest." He was, for the second time, advised of his Miranda rights. During a conversation that lasted no more than ten minutes, Demetrious made inculpatory statements regarding the crime. At 7:00 p.m., Douglas Cunningham was brought into the room; Demetrious stated to his father, "I took the car. I killed the old lady." Douglas left the interview room and the interview ended. Demetrious was then placed under arrest for the murder of Elsie Orlinsky.

This Court specifically finds the testimony of Demetrious not believable that prior to the inculpatory statement a parent's or attorney's presence was requested, that Demetrious was ever called names, made threats, promises or physically abused to induce the statement. This Court also finds incredible the testimony that Demetrious was locked in an interview and told that he parents had gone home leaving him alone in police custody or that Douglas Cunningham was ever pushed or wrestled out the interview room to prevent his interaction with his son. This Court does not find any credible evidence that Demetrious's statement was the result of any police misconduct or any mental or physical coercion directed towards Demetrious. This Court does believe that the Cunninghams were very much interested in the well being of their son (as evidenced by their seeking the counsel of the East Chicago Police

Department in informally advising Demetrious as to the legal perils of joy riding in the family car) and that they were advised that Demetrious was only a *witness and not a suspect* in the murder being investigated. The Court does not find this a police ruse or misrepresentation to the Cunningham's insofar as Demetrious was not actually a ***suspect*** until he made his inculpatory statements. The Court is mindful that Detectives Baker and Solecki had been advised on December 12th by Borum and Jackson that Cunningham had made admission to the killing and taking of Orlinski's car, but for whatever reason, they discounted, as not being true, this third party admission. James Pugh had been identified and charged prior to this time with the invasion and taking of the Orlinski car.

Analysis

Persons subjected to ***custodial*** police interrogation regarding matters that might tend to incriminate them are entitled to the procedural safeguards outlined in Miranda v. Arizona. Not all statements made while in police custody are considered to be the product of interrogation. Rhode Island v. Innis, 446 U.S. 291, 299, 100 S. Ct. 1682, 1689 (1980). Statements that are volunteered by one in custody can be admitted at trial. Miranda v. Arizona 384 U.S. 436, 478, 86 S. Ct. 1602 (1966). Voluntary statements made to police while in custody before the defendant was a ***suspect*** may be admitted at trial. People v. Wilson 164 Ill. 2d 436, 450 (1994). Interrogation occurs through express police questioning or by any words or actions on the part of the police that the police should know are reasonably likely to elicit an *incriminating* response from the ***suspect.*** People v. Wilson. 164 111. 2d 436, 450 (1994).

In the case at bar, the evidence clearly demonstrates that prior to 6:50 p.m. on December 14th, prior to viewing the

lineup and shortly thereafter when being questioned about his inability to identify James Pugh, he was merely a *witness and not a suspect;* he was not in custody; he was not being "interrogated" for the purpose of eliciting incriminating responses; and the Miranda warnings were therefore not constitutionally required. These warnings were not required until the defendant changed his status as a witness to a suspect when he began to make incriminating statements. As a result, all of the volunteered statements made prior to this time arc not subject to suppression. After the lineup when the defendant was unable to make an identification of the suspect, James Pugh, who was in custody, and who from earlier conversations the police believed Demetrious would be able to identify, the defendant made inculpatory statements to Detective Baker in response to questions that concerned his inability to identify Mr. Pugh and not as a result of "interrogation" likely to elicit incriminating responses. Miranda warnings again were not therefore constitutionally required. In any event, the credible evidence reveals that as a precautionary measure, not knowing what the Demetrious might say, Detective Baker properly advised the defendant of his Miranda rights, including those concerning his juvenile status.

The court finds that although the Miranda warnings were not required, the defendant was properly given his Miranda warnings prior to making incriminating statements and that he understandingly and knowingly waived those rights. This court does not find any credible evidence in the record that Demetrious or any of his family members, ever asked for or invoked Demetrious's right to counsel prior to Demetrious making his statement to the police at 6:50 p.m. on December 14th. Nor does this court find any credible evidence that the statements elicited from Demetrious were made after he had elected to remain silent. There is no credible evidence in the record that due to his age,

education, physical, mental, emotional or psychological condition that he was not able to understand or knowingly waive his constitutional rights.

The remaining issue in this case then is whether or not the statement should be suppressed because it was made in the absence of a concerned parent who was present at the police station at the time the statement was made. In other words, do the police have an affirmative duty to interrupt the non-custodial statement *of* a (juvenile) ***witness*** when, during the course of their interview, the statement becomes incriminating in order to provide a parent or youth officer, and if so, is suppression required when the police fail to to do so?

In resolving this issue, in light of two recent appellate court opinions discussed below, People v. J.J.C., a Minor, No. 2-96-133 1, 1998 111. App. Lexis 11(1998), and In re A.R.. No. 1-96-33 *05*, 1st District (1998), and the presumption created therein, this court starts the inquiry with the presumption that Demetrious Cunningham's statements to the police should be suppressed as not being voluntary because his father (who was present in the Area) was not present and in the company of his son in the interview room at Area 2 police headquarters at 6:00 p.m. on December 14th, 1994, when the inculpatory statement was made. This Court believes that based upon a review of the current status of the law which is discussed below, that the police had a duty to interrupt the statement of Demetrious once it became clear that he was incriminating himself in order to provide a parent or youth officer. However, there is no per se rule that a parent or youth officer, in fact, be present. The absence, in this case, of Demetrious' s father or a youth officer is but one of several factors to consider. The issue of suppression of the incriminating statements hinges upon a determination of whether the statement was voluntarily given, when

considering all of the circumstances under which the statement was made.

To ensure that both the State and defense were given adequate opportunity to explore the "totality of the circumstances" surrounding the statements made by Demetrious, this court has permitted extensive testimony as it relates to the police "course of conduct" in dealing with the defendant.

Much of the testimony presented in support of the motion by petitioner involves police conduct after the incriminating statements were made. The relevance of this testimony pertains to whether or not the police created an environment that evening on December 14th at 6:00 p.m. when Demetrious arrived at the police Area to view a lineup and continuing through his incriminating statements, which somehow improperly induced his confession. This Court finds the testimony of Douglas Cunningham, Robert Louise Cunningham, Elliott Cunningham, Estelle Powell and Lonnie Randolph, even if true, as it concerns not allowing family members to see Demetrious after the incriminating statements were made, sheds little light on the issue of voluntariness. After the defendant made inculpatory statements, he was placed under arrest and taken into custody. Although, it might have been a humane thing to do, this Court is not aware of any authority requiring police to allow contact visits with relatives or others who have been arrested and charged with crimes while still in lockup areas a local police stations. Judges in courtrooms have no obligation to do so; county jails and prisons have strict procedures for allowing such contact visits. Once an attorney, Lonnie Randolph, arrived at the Area, he was permitted to see his client.

When a defendant claims that the confession was not

voluntary in accordance with 725 ILCS 5/1 14-11, the burden of proving that the statement was voluntary is on the State. The state must establish, by a preponderance of the evidence, the voluntary nature of a defendant's confession. People v. Wilson 116 Ill. 2d 29, 106 Ill. Dec. 771, 506 N.E.2d 571 (1987).

When it is alleged that the statement from a suspect is the product of coercive conduct, in determining the admissibility of a confession, the key inquiry is whether it was made freely and voluntarily, without compulsion or inducement, or whether the defendant's will was overcome at the time he confessed. People v. McGhee, 154 Ill. App. 3d 232, 239, 507 N.E. 2d 33, 37 (1st District, 1987). Voluntariness depends not on any one factor, but rather upon the totality of the circumstances. People v. Prude. 66 1ll. 2d 470, 475, 363 N.E. 2d 371, 373 (1977). To be admissible at trial, a confession must be free, voluntary, and not obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. People v. Thomas, 137 Ill. 2d 500, 516, 561 N.E. 2d 57 (1990). The relevant circumstances include: the existence of any promises, threats or physical coercion, whether the accused received his constitutional rights; the duration of the questioning; and the age, education, and intelligence of the defendant. People v. Martin, .102 Ill. 2d 412, 427, 466 N.E. 2d 228, 234-235 (1984). Other relevant individual aspects include emotional characteristics, previous experience with the criminal justice system, and whether the statement was induced by police deception. People v. McFarland. 228 Ill. App. 3d 107, 117, 592 N.E. 2d 471 (1992). The test for voluntariness of a confession is whether under the totality of the circumstances, the statement was made, freely, without compulsion or inducement, with consideration given to the characteristics of the accused and the details of the interrogation. People v. Jones 156 1ll. 2d 225, 242, 620 N.E.2d

325 (1993).

Where a statement has been elicited from a minor, the courts have long viewed the issue as a serious concern, and held that the greatest care must be taken to insure that it is voluntary. People v. Prude. 66 Ill. 2d at 476, 363 N.E.2d at 373. In such cases courts are required to take utmost care to insure that the confession is not coerced, suggested, or the result of the juvenile's ignorance of his rights or his adolescent fantasy, fright or despair. In re J.D., 121 1ll. App. 3d 927, 936, 460 N.E.2d 412, 418 (1st District, 1984). Accordingly, additional factors may become significant, such as the time of day, and the presence of a parent or other adult interested in the juvenile's welfare. People v. Brown, 235 Ill. App. 3d 479,490, 601 N.E. 2d 1190, 1197 (1st District, 1992). Notably, section 5-6(2) of the Juvenile Court Act provides:

> "A law enforcement officer who takes a minor into custody without a warrant under section 5-5 shall, if the minor is not released, immediately make a reasonable attempt to notify the parent or other person legally responsible for the minor's care or the person with whom the minor resides, that the minor has been taken into custody and where the minor is being held, and the law enforcement officer shall without unnecessary delay take the minor to the nearest juvenile police officer designated for such purposes in the county of venue." 705 ILCS 405/5-6(2) (West 1996)

The purpose of the "notice" requirement is to permit, where possible, a parent to confer and counsel with the juvenile before interrogation and confession. People v. Montanez, 273 Ill. App. 3d 844, 652 N.E. 2d 1271 (1995); People v. Fuller. 292 Ill. App. 3d 651 (1st District, 1997). The Juvenile Court Act applies to a juvenile who is tried as an adult. (People v. Montanez, 273 Ill. App. 3d 844; People v. Pico. 287 Ill. App. 3d 607, 678 N.E. 2d 780 (1st District, 1997).

However, notwithstanding this provision, the failure to have a parent present does not necessarily render the statements made at that time inadmissible. In re D.C., 244 Ill. App. 3d 55,61, 613 N.E. 2d 1139, 1144 (1st District, 1992). Under Illinois law, a juvenile does not have a per se right to consult with a parent before questioning or to have the parent present during questioning. However, the presence or absence of the parent is a factor to be considered. People v, Brown, 182 Ill.App.3d 1046, 1053, 538 N.E. 2d 909, 913 (1st District, 1989). As early as December 12th, at the East Chicago police station, Demetrious's parents had "notice" that police officials had information concerning Demetrious and his connection to a murdered victim's car. They had the opportunity of counseling Demetrious or seeking an attorney's advice at any time prior to returning to the police station to view the lineup. There is no evidence in the record that Douglas or Robert Cunningham ever themselves asked Demetrious anything about his involvement or witnessing of the crime, so as to put themselves in a better position to properly counsel Demetrious. The relevant inquiry is whether the absence of an adult interested in the defendant's welfare contributed to the coercive circumstances surrounding the interview, not whether contact with a parent was denied. People v. Knox 186 III. App. 3d 808,814, 542 N.E. 2d 910 (1989); People Fuller, 292 Ill.App. 3d 651, 665 (1st District, 1997). Two recent appellate court opinions concerning the admissibility of juvenile confessions have taken these principles one step further. In People v. J.J.C., a Minor, No. 2-96-1331, 1998 III. App. Lexis 11(1998), the court ruled that when a juvenile's parent is present and requests to confer with their child, and is effectively refused by the law enforcement authorities to do so, the presumption arises that the juvenile's will is overborne and that the statement is involuntary. In In re A.R. No. 1-96-3305 1st District (1998), in addressing an ineffective assistance of counsel claim based upon an attorney's failure to file a motion to suppress a juvenile confession prior to trial, a new trial was ordered

based upon a ruling that because no parent or youth officer was present until after the confession, had a motion to suppress been filed, there was a "reasonable probability" that the confession would have been suppressed.

Conclusion

Considering all of the credible testimony, in light of the applicable legal authority, and considering the "characteristics of the accused and the details of the interrogation", this Court concludes that besides whatever self imposed pressures or emotional state that may have existed at the time Demetrious made his statements to the police incriminating himself in the murder of Elsie Orlinski, that those statements were nonetheless freely and voluntarily made without complusion (sic), threat, physical assault, promise or other inducement and that his will was not overcome at the time he confessed. The defendant had been properly advised of his constitutional rights; the duration of the questioning in total, was less than twenty minutes during the early evening hours; he was 15 years of age, attending a catholic high school, with no apparent learning or emotional disabilities. This Court does not conclude
that the incriminating statement was a product of juvenile ignorance of his rights, nor of his adolescent fantasy, fright or despair. Although this Court believes that the detectives should have stopped their questioning of Demetrious as soon as it became clear that his status had shifted from that of a witness to that of a suspect when he began to make incriminating statements, in order to advise his concerned father (who was seated outside the interview room) of Demetrious's change in status, the court does not find that his parents absence in any way contributed to or created a coercive atmosphere. The defendant confessed in this case solely due to the fact that in the statements he had made to the police ***as a witness and not as a suspect,*** he had been "caught" in lie, and being so "caught" he wanted to tell the truth and get his crime "off of his chest." The only police action that prompted this re-evaluation of the statements

that Demetrious was making to the police, was that the police confronted him with discrepancies they knew of and they told him that they didn't believe he was telling the truth with regard to his ability or inability to identify James Pugh as the person from whom he received the murdered victim's car. This is not the kind of "coercion" that should render the evidence inadmissible. Upon review of the "totality of the circumstances" surrounding Demetrious's choice to make incriminating statements, there was no police deception, no police misconduct; and no coercive atmosphere.

This Court finds that the state has by competent and credible evidence overcome the "presumption" raised People v. J.J.C., a minor, and in In re A.R., that Demetrious's will was overborne, even though the statement was made in the absence of a concerned parent who was present at the police station. This Court finds that the state has met their burden of proof by a preponderance of the credible evidence presented that Demetrious's statement was freely and voluntarily given in light of all of the circumstances under which it was made.

The petitioner's motion to suppress statements, based upon the foregoing discussion shall be and is hereby respectfully denied.

ENTERED: _____

(Signed)

Lon William Schultz
Judge of the Circuit Court
Criminal Division
Cook County, Illinois

DATED: April 29, 1998

Filed with the Circuit Court Clerk on April 29, 1998

APPENDIX C

LETTER FROM CLERK OF THE SUPREME COURT OF ILLINOIS

Supreme Court Of Illinois
Clerk Of the Court
94477 Supreme Court Building
Springfield, Illinois 52701
(217) 782-2035

October 2, 2002

Mr. Ronald F. Neville
Neville & Mahoney
221 N. LaSalle St., S#2100
Chicago, IL 60601

No. 94477 -
People State of Illinois, respondent, v. Demetrius Cunningham, petitioner. Leave to appeal, Appellate Court, First Division

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 24, 2002.